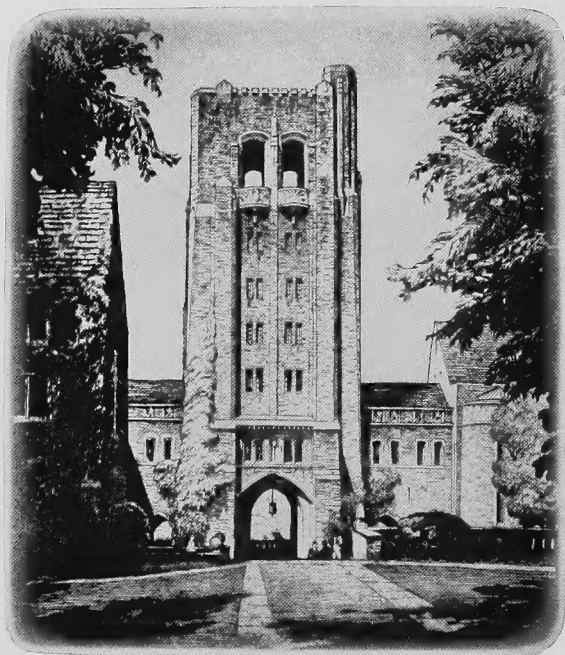


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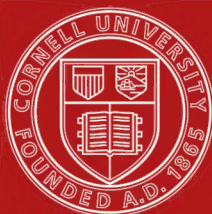
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A TREATISE
ON
THE LAW OF
MECHANICS' LIENS
AND
GENERAL CONTRACTING
OF THE
STATE OF NEW YORK
WITH FORMS
BY
THOMAS H. RAY,
Asset
Of the New York City Bar

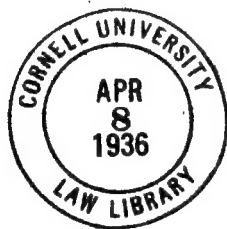


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PREFACE.

The amount and value of the work which is performed annually by General Contractors and Builders within the State of New York is nowhere exceeded. Within recent years the opportunities offered them in both public and private work have been practically unlimited.

In connection with the performance of such contracts controversies often arise which require an immediate solution, and the subject has given rise to an abundance of litigation. An attempt is here made to state systematically and concisely the principles of law applicable to such legal questions, as settled by the weight of judicial authority in this State.

THOMAS H. RAY.

42 Broadway, New York City.

July 1, 1914.

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INTRODUCTION.

Land is the foundation of human wealth. Man is compelled by the progress of civilization to direct his efforts more and more to its improvement. He should be encouraged to do so by proper legislation. Its stability, permanence and the possibility of an ever enhancing value make real estate the most attractive of investments. But it is this very quality of fixity and permanence, as contrasted with the transiency and instability of chattels, which makes necessary a distinction in law between real and personal property. Because of this legal distinction and by the operation of the rule of law which transfers the title to all fixtures to the owner of the land, arises the primary necessity for a statute providing for Mechanic's Liens upon Real Property.

One who sells a chattel can deliver it physically to the purchaser. But he need do so only upon the receipt of the purchase price. The mechanic who performs work upon personal property obtains possession of it and can demand his compensation before he returns it to the owner. If the owner of personal property pawns it, the lender gets possession and returns it only upon the repayment of the loan. Thus, regardless of any statutory provisions, the vendor, mechanic or lender is equally able to protect himself by reason of his "natural lien" of possession.

By contrast, if the owner of real property wishes to sell it, he cannot deliver the land to the purchaser. But the law has contrived a method by which he may do so constructively by the giving of a deed, and proof of the delivery is preserved by the provisions for the

recording of the deed. Likewise, when the owner wishes to borrow money, giving his real estate as security for the loan, he delivers to the lender written evidence of his lien in the form of a mortgage. As well, a different rule affects the mechanic or laborer who furnishes material and does work upon the real property of another. Such labor and materials have by operation of law become a part of the real estate and may be conveyed by the owner of the real estate who may be other than the person with whom the mechanic or laborer has contracted and against whom the latter can have no claim except such as is given him by statute. The mechanic and laborer has thus lost control of the materials, and has nothing tangible to seize and hold as security for the payment to him of the indebtedness from the person with whom he has contracted.

To relieve the material man and mechanic from this hazardous situation in which he would otherwise often find himself, and to give to him as nearly as possible the same protection which is afforded those who deal in chattels, the legislature has provided the Mechanic's Lien Law. The constitutionality of such statute has been too well established to require more than a mere statement of the fact.

It has been necessary to recognize the rights of all possible claimants against the real property in the preparation of the statute, including the owners of the fee or other interest therein, mortgagees, judgment and general creditors, and at the same time to give every possible protection to the mechanic's lienor. Since ownership and claims against real property can only be evidenced by writings, properly filed or recorded, it is necessary that the mechanic or material man asserting a claim against real estate be authorized to give notice of his claim in the same manner. There-

fore, no practical Mechanic's Lien Law can be devised which is not founded upon the basic principle that the recording or filing of an instrument affecting real property gives constructive notice to all interested parties of its existence, and that claims founded upon such instruments must, except in cases of fraud, be given priority in the order of their filing.

The New York statute has been built upon this theory. Thus the lienor is permitted at any time to demand the terms and status of the owner's contract with the contractor. (Section 8.) If his suspicions are thereby aroused, he may either demand sufficient security for the payment of his account, or protect himself by at once filing his notice of lien for both past and future claims, since the statute normally limits the extent of the owner's liability to the unpaid balance due to the contractor. (Section 4.) In harmony with this general scheme section 11 permits the service of a copy of the notice upon the owner or contractor; section 7 protects the lienor against fraudulent advance payments after the filing of his lien, or against fraudulent mortgages or incumbrances made with the connivance of the beneficiary thereof and recorded after the conception of the lienor's claim; and sections 15 and 16 protect the lienor against unrecorded assignments.

The statute recognizes the fact that the mechanic and material man can have no inchoate right of lien. He may acquire a preference if he acts upon his rights pursuant to the requirements of the statute. But the filing of the notice originates the lien. If anterior thereto, another has honestly and by diligence acquired a superior right, it cannot and should not be overreached by a lienor who has meanwhile been sleeping upon his rights. But the statute does not deprive of any of their rights those whom it seeks to benefit,

since it does not take away the lienor's common-law action. Thus every lienor has two rights — one *in personam* and one *in rem* — which, generally speaking, may be pursued simultaneously, although there can be but one recovery.

In a consideration of the statute it is important to keep continually in mind its purpose, which has for its foundation the equitable principle that the owner whose property has with his consent benefited by labor and materials shall be liable for the same. Accordingly it must be recognized that the right of lien is not against the real property itself, but against the interest therein of the owner, who has either directly contracted for the improvement or who has given his consent to it when it has been contracted for by another. Therefore, it has been requisite by definition to broaden the meaning of the term owner beyond its ordinary significance of "owner in fee." And the term is necessarily made to include all possible interests in the real property which may be subject to a lien. Thus the lien may be against the interests of two or more owners in the same property, which even though merged might not constitute a title in fee absolute.

In further accord with its object the statute has necessarily provided that the lienor need not base his claim upon a direct contract with the owner, but if the improvement to the property has been made with his consent and he has acquired the benefit of it, the lien may attach to his interest therein, in spite of the fact that there is no privity between the lienor and owner.

Yet in justice to any owner his interest in the property could not be made liable to an extent greater than that to which he had assumed liability either by direct agreement or by consent, express or implied. Thus if

a contractor had sub-contracted work at a figure in excess of the amount stipulated in his contract with the owner, the latter could upon no just theory be made liable for such excess to a lienor. It follows that the burden must be placed upon him who claims the lien, of tracing his rights back to the owner either by a direct contract with him for the improvement of the property or through one who has contracted for that purpose with him or with his consent, and that the lienor's right can only be determined by an examination of such contract, express or implied, under or through which the services were performed or the materials furnished. So that though the right of lien is given by the statute, and does not and could not arise out of a contract itself, the only effect of the statute is to apply and apportion the balance remaining due upon the contract under which the improvement was performed, to those lienors who have complied with the provisions of the statute.

To this extent a knowledge of the law as it affects both public and private contract work is imperative to the proper application of the statute relating to Mechanic's Liens, and it is therefore fitting that the subjects should be treated in one volume, as is here attempted.

An examination of the statute will disclose that the arrangement of its provisions is not entirely logical. Therefore a proper treatment of the subject requires a regrouping of some of the sections of the statute under a general heading to which they more properly relate, rather than a mere annotation of the sections of the statute in the order in which they appear. Thus, under the chapter "Operation and Effect of Lien" have been treated, among other subjects: "Extent of Lien," "Priority of Lien," "Preferences" and "Collusive Payments," the provisions

relating to which are found in sections 4, 13, 56 and 7, respectively, of the statute. A mere mention of the topics treated by these various sections of the statute shows that they must relate to the same subject and should be treated under one heading. And this fact is made more evident by the language of the statute itself, since a part of the phraseology used in section 4 is almost identical with that used in section 13.

The statute provides for two classes of mechanic's liens, which are designated as:

1. Mechanic's Liens on Real Property.
2. Mechanic's Liens under Contracts for Public Improvements.

The lien upon real property, as hereinbefore stated, attaches to the interest of the owner in the real property, which interest the law provides may be sold upon a foreclosure of the lien. Where the lien is for materials furnished or labor performed under an agreement with one who has contracted for the performance of a public improvement there is no necessity for awarding to the lienor the right to a sale of the real property, first, because there is no possibility that the state or municipality would fraudulently dispose of such property in an attempt to destroy the rights of the lienor; and, second, because of the slight possibility of the insolvency of the state or municipality, which would make resort to the sale of real property necessary. Therefore, the lien on a public improvement contract attaches only to the balance of the moneys due from the state or municipality to the contractor who has agreed to perform the contract for the improvement, and not to the owner's interest in the real property.

The provisions for the enforcement of the lien on a public improvement are in general similar to those

for the enforcement of liens upon real property, with the exception that the judgment does not direct a sale of the real property, but instead decrees that the claimant has a lien upon the balance of moneys due under the contract and directs the payment of a sufficient amount of the same to the claimant to satisfy his lien.

The principles of law applicable in each case are the same, but where any distinction is made the particular requirements of the statute must be complied with in each case.

THE LAW OF MECHANICS' LIENS

AND

GENERAL CONTRACTING.

PART ONE.

CHAPTER ONE.

FORMATION OF CONTRACTS.

§ 1. Capacity to contract.

The formation and execution of contracts for public improvements are always surrounded with statutory regulations, designed to protect the public. A reasonable precaution directs that contractors engaging in public work shall, before entering into such contracts, make certain of the capacity of the municipality or state to contract. The term "municipal corporation" includes a county, town, school district, village, city, and any other territorial division of the state established by law with powers of local government. See § 3, General Corporation Law; § 2, General Municipal Law. They are creatures of the state, and unlike private individuals and corporations are possessed of but limited authority to enter into contracts. In addition to those powers expressly granted, municipal corporations are possessed only of such implied powers as are indispensable, and can be inferred from a necessity to do something in the efficient exercise of the actual

power possessed. *Wakefield v. Brophy*, 122 N. Y. Supp. 635, 67 Misc. 298; *Schneider v. City of Rochester*, 160 N. Y. at 172; *Theall v. Village of Port Chester*, 87 N. Y. Supp. 798, 93 A. D. 416; *Drew v. Village of White Plains*, 142 N. Y. Supp. 577, 157 A. D. 394. See § 10, Art. 8, N. Y. Constitution.

Such implied powers are always construed for the benefit of the public. And it therefore follows that:

A.

Parties engaging in public contract work are charged to their peril, with knowledge of such limitations of municipal authority.

Lyddy v. L. I. City, 104 N. Y. at 223; *Village of Ft. Edward v. Fish*, 156 N. Y. 363; *Smith v. City of Newburgh*, 77 N. Y. 136; *Parr v. Village of Greenbush*, 72 N. Y. 463; *Starin v. Town of Genoa*, 23 N. Y. 449; *Burgard v. State of N. Y.*, 114 N. Y. Supp. 550, 61 Misc. 23; *Burns v. City of N. Y.*, 143 N. Y. Supp. 952, 158 A. D. 729.

B.

Contracts which municipal officers are forbidden by statute to make are not void simply as ultra vires but as forbidden acts.

Village of Ft. Edward v. Fish, 156 N. Y. 363; *Washington Life Ins. Co. v. Clason*, 162 N. Y. 305; *Becker v. City of New York*, 176 N. Y. 441; *Hyland v. Village of Ossining*, 111 N. Y. Supp. 309, 127 A. D. 291.

The distinction between a public contract and a private contract may be seen by an examination of the case of *Cunningham v. Massena Springs and Ft. C. R. Co.*, 18 N. Y. Supp. 600, 63 Hun, 439, and the cases cited therein.

C.

No recovery can be had by the contractor where the contract is formed in violation of a statute and void ab initio, even though benefits under it have been accepted by the municipality.

In *McDonald v. Mayor*, 68 N. Y. 23, the plaintiff, at the request of the superintendent of roads of the City of New York, delivered certain gravel and stone, which were used in repairing streets. It was not alleged or proved that the necessity of the purchase had been certified by the head of the department of public works, or that the expenditure was authorized by the common council. It was held that no recovery could be had on *quantum meruit* or otherwise.

The court distinguished the case from *Nelson v. Mayor*, 63 N. Y. 535, where it was said:

“ If the city obtains property under a void contract and actually uses the property and collects the value of it from property owners by assessment, the plainest principles of justice require that it should make compensation for the value of such property to the person from whom it was obtained.”

See also *People ex rel. Buffalo S. R. Co. v. Laidlaw*, 155 A. D. 759, 140 N. Y. Supp. 641; *Niland v. Bowron*, 193 N. Y. 180; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631; *Parr v. Village of Greenbush*, 72 N. Y. 463; *Baird v. Mayor of N. Y.*, 83 N. Y. 254; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65. But see *Staten Island Water Co. v. City of New York*, 144 A. D. 318, 128 N. Y. Supp. 1028.

Similarly where a private contract requires the performance of an illegal act, the contract is void whether the parties knew the law or not.

“ When a contract is to do an act prohibited by statute, no action can be maintained to enforce per-

formance or to obtain damages for breach thereof.” *Burger v. Roelsch*, 28 N. Y. Supp. 460, 77 Hun, 44.

See also *Brinkman v. Eisler*, 16 N. Y. Supp. 154; *Romano v. Bruck*, 54 N. Y. Supp. 935, 25 Misc. 406; *McLaughlin v. City of New York*, 143 N. Y. Supp. 819, 158 A. D. 517; *People ex rel. Ford Co. v. Lewis*, 145 N. Y. Supp. 862, 159 A. D. 612.

D.

But where the contract although irregular is not forbidden by statute, recovery may be had on quantum meruit.

In the case of *Kramrath v. City of Albany*, 127 N. Y. 575, the court held:

“ When the act is *ultra vires*, it is void, and there can be no ratification, and when the mode of contracting is limited and provided for by statute, an implied contract cannot be raised. But a corporation, like an individual, is liable upon *quantum meruit* when it has enjoyed the benefit of the work performed or goods purchased when no statute forbids or limits its power to make a contract therefor.”

“ Here the power to make a contract for the work done existed and the city having had the benefit of such work is liable for the value.”

See also *People ex rel. Lyon v. McDonough*, 173 N. Y. 181, where the court said:

“ If the statute is substantially complied with and its actual purpose secured, especially where it has been acted upon and a proper contract in pursuance of it has been entered into, such as the statute requires, an unimportant variance in the proposed bid does not render the contract invalid. In this case the contract was made in strict performance with the statute, and the only defect claimed is that the proposal of the lowest bidder, to whom the contract was awarded, did

not have a guaranty in the precise language of the statute indorsed thereon, although it was in the form required by the printing board."

E.

An illegal and void contract cannot be ratified by a municipal corporation.

Thus in *Niland v. Bowron*, 193 N. Y. 180, the court said:

"The town board had no authority to enter into the contract in the first instance, and it could not by its subsequent action ratify a contract which neither it nor the highway commissioner could make."

Likewise, see *Smith v. City of Newburgh*, 77 N. Y. 130 at 136, to the effect:

"A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority."

"When the act done is *ultra vires*, it is void and there can be no ratification." *In re Niland*, 99 N. Y. Supp. 914 at 916, 113 A. D. 661.

See also *People ex rel. Tupper Lake Water Co. v. Sisson*, 77 N. Y. Supp. 376, 75 A. D. 138.

F.

Moneys paid out under an illegal and void contract can be recovered by a municipality from the contractor.

Village of Fort Edward v. Fish, 156 N. Y. 363; *Board of Supervisors v. Ellis*, 59 N. Y. 620; *People v. Fields*, 58 N. Y. 505.

G.

Recovery can only be had on illegal contracts after ratification by the legislature.

In the case of *Brown v. Mayor*, 63 N. Y. 239, at page 244, the court says:

“ The power of the legislature to ratify a contract entered into by a municipal corporation for a public purpose which is *ultra vires*, results from its power to have originally authorized the very contract which was made. Municipal corporations are agencies of the state through which the sovereign power acts in matters of local concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and may annex such limitations and conditions to its exercise as in its discretion it deems proper for the protection of public interests. The right to limit involves the power to dispense with limitations, and in this case, as the legislature could have authorized the contract without previous advertisement or competitive bidding, it may affirm the contract although made originally without authority of law.”

See also *Mayor v. Tenth National Bank*, 111 N. Y. at 459, to the effect that —

“ Municipal corporations are creatures of the state, and exist and act in subordination of its sovereign power. The legislature may determine what moneys they may raise and expend, and what taxation for municipal purposes may be imposed; and it certainly does not exceed its constitutional authority when it compels to pay a debt which has some meritorious basis to rest on.”

See also *Nelson v. Mayor of N. Y.*, 63 N. Y. 535; *O'Hara v. State of New York*, 112 N. Y. 146; *Kingsley v. City of Brooklyn*, 78 N. Y. 206.

And see § 15, County Law, as to right of a county to ratify an informal act of a town or village.

Attention should, however, be called in connection with this subject to § 246 of the New York City Charter, providing as follows:

“Claims against city; power of board of estimate to pay or compromise on equitable grounds, although illegal.

§ 246. The board of estimate and apportionment may, in its discretion inquire into, hear and determine any claim against the city of New York, which has been certified to said board in writing by the comptroller as an illegal or invalid claim against the city, but which, notwithstanding, in his judgment it is equitable and proper for the city to pay in whole or in part, and if upon such inquiry the board by an unanimous vote determines that the city has received a benefit and is justly and equitably obligated to pay such claim and that the interests of the city will be best subserved by the payment or compromise thereof, it may authorize the comptroller to pay the claim . . .”

The provisions of this section are self-explanatory. It is, however, referred to in the following cases:

Dady v. City of New York, 121 N. Y. Supp. 860, 65 Misc. 382; *Donlan Contracting Co. v. City of New York*, 119 N. Y. Supp. 617, 64 Misc. 471.

See also § 205, Second Class Cities Law, and General City Law, article 2a, “Powers of Cities,” as amended by Laws of 1913.

§ 2. Bids and proposals.

General rule. In the field of endeavor commonly known as “general contracting,” it is customary to call for bids on the desired work before the making of a contract for its performance. And subject to qualifications and exceptions to be hereafter stated, it is made mandatory by statutes, that all contracts for public improvements shall be founded upon bids submitted in response to requests by advertisement, and that the contract shall be awarded to the lowest qualified bidder responding. The wisdom of such cautious measures in private work, and the motive and necessity for such precautionary methods in public work are obvious.

It is manifestly impossible to analyze each of the vast number of restrictive statutes affecting the forma-

tion of public contracts, which years of experience and incessant litigation have shown to be adaptable to local governmental conditions. An examination of the statutes cited from the "Cities," "Town," and "Village" Laws, which are in force generally throughout the state of New York, together with a study of the provisions of the Charter of the City of New York, will serve to illustrate the general legal principles applicable.

The general statutory provisions relative to the formation of contracts with the City of New York are found in §§ 417 to 422 of the New York Charter, and §§ 509 to 528 of the Code of City Ordinances.

As to the power to pass ordinances see *Lyth v. Hingston*, 43 N. Y. Supp. 653, 14 A. D. 11; *City of Yonkers v. Yonkers R. R.*, 64 N. Y. Supp. 955, 51 A. D. 271; *City of Rochester v. West*, 51 N. Y. Supp. 485, 29 A. D. 125.

Many of the minor detailed provisions of the city ordinances have been held to be such that a violation thereof constitutes a mere irregularity of insufficient importance to void the contract. See § 17. The essential provisions of the New York Charter to which reference will be made are found in the following sections as here abridged.

"Contracts for work or supplies.

§ 419. All contracts to be made or let for work to be done or supplies to be furnished, except as in this act otherwise provided, . . . shall be made by the appropriate borough presidents or heads of departments under such regulations as shall be established by ordinance or resolution of the board of aldermen. Whenever . . . the several parts of the said work or supplies shall, together, involve the expenditure of more than one thousand dollars, the same shall be by contract, . . . unless otherwise ordered by a vote of three-fourths of the members elected to the board of aldermen; and all contracts . . . shall be founded on sealed bids or proposals, made in compliance with public notices, duly advertised . . . If a borough president or the head of a department

shall not deem it for the interest of the city to reject all bids, he shall without the consent or approval of any other department or officer of the city government, award the contract to the lowest bidder, unless the board of estimate and apportionment by a three-quarter vote of the whole board, shall determine that it is for the public interest that a bid other than the lowest should be accepted; the terms of such contract shall be settled by the corporation counsel as an act of preliminary specification to the bid or proposal.

In any contract . . . made hereunder, there may be inserted, . . . a provision that additional work may be done or supplies furnished for the purpose of completing such contract, at an expense not exceeding five percentum of the amount of such contract, if such additional work or supplies shall be ordered by such borough president or head of department.

The bidder whose bid is accepted shall give security for the faithful performance of his contract in the manner prescribed and required by ordinance; and the adequacy and sufficiency of this security shall, in addition to the justification and acknowledgment, be approved by the comptroller. All bids or proposals shall be publicly opened by the officer or officers advertising for the same, and in the presence of the comptroller, but the opening of the bids shall not be postponed if the comptroller shall, after due notice, fail to attend; if the bidder whose bid has been accepted shall neglect or refuse to accept the contract within five days after written notice that the same has been awarded to his bid or proposal, or if he accepts but does not execute the contract and give the proper security, it shall be readvertised and relet as above provided. In case any work shall be abandoned by any contractor, it shall be readvertised and relet by the appropriate borough president or the head of the appropriate department in the manner in this section provided. . . . Every contract . . . shall be executed in duplicate, and shall be filed in the department of finance; together with a copy of the resolution or ordinance of the board of aldermen and the local board, and together with the approval of the board of estimate and apportionment wherever the same is required by the provisions of this act, or copies of both . . . authorizing said work; . . . within five days after the contract shall have been duly executed by the contractor.

No expenditure for work or supplies involving an amount for which no contract is required shall be made, except the necessity therefor be certified to by the appropriate borough president or the head of the appropriate department, and the expenditure has been duly authorized and appropriated."

"Proposals to be advertised; deposit to accompany bid.

§ 420. Whenever proposals for furnishing supplies or doing work are invited by advertisement by any department or officer, such department or

officer is authorized and directed to require, as a condition precedent to the reception or consideration of any proposal, the deposit with such department or officer of a certified check upon one of the state or national banks of the said city, drawn to the order of the comptroller, or of money or of corporate stock or certificates of indebtedness of any nature, issued by the city of New York, which the comptroller shall approve as of equal value with the security required; such checks or money or corporate stock or certificates of indebtedness to accompany the proposal, to an amount not less than three nor more than five percentum of the amount of the bond required by the department or officer for the faithful performance of the work proposed to be done or supplies to be furnished. Within ten days after the opening of bids, the comptroller shall return all the deposits made to the persons making the same, except the deposits made by the lowest three bidders; within three days after the decision as to whom the contract is to be awarded, the comptroller shall return the deposits to the remaining persons making the same, except the deposit made by the bidder whose bid has been accepted, and if the said bidder whose bid has been accepted shall refuse or neglect, within five days after due notice that the contract has been awarded, to execute the same, or to furnish the required bond, the amount of deposit made by him shall be forfeited to and retained by the said city as liquidated damages for such neglect or refusal, and shall be paid into the sinking fund of the city, but if the said bidder shall execute the contract and furnish the required bond within the time aforesaid, the amount of his deposit shall be returned to him." . . .

Attention is also directed to §§ 120 to 125 and 204 of "The Second Class Cities Law," Consolidated Laws of New York, containing similar provisions relating to cities of the second class; §§ 89, 130, 143, 220, 223, 240, 266, 276, 318, 333, 337 and 340 of "The Village Law," and §§ 234, 247, 260, 270, 287, 313, 320, 431, 462 and 487 of "The Town Law" relative to the formation of contracts by such municipalities. See also "Highway Law," §§ 48 to 51, 93, 120 to 179; "County Law," §§ 12 to 42; "Rapid Transit Law" affecting Public Service Commissions; Laws of 1913, chapter 540, § 36.

§ 3. Bid is an offer.

It is equally true of both public and private contracts that the bid on the part of the contractor con-

stitutes an offer, not an acceptance of an offer, and the mere fact that the bid is lowest does not of itself give the bidder any right against the party calling for the bid. *MacFarlane v. Mosier Summers*, 141 N. Y. Supp. 143, 79 Misc. 460.

§ 4. Withdrawal of bids.

It has been held that although in cases of private contracts a bidder can always withdraw his offer before its acceptance, a different rule prevails in the case of public contracts. The argument presented was that in public contracting all parties are operating under regulatory statutes and subject to the restrictions thereby imposed; and that if bids were permitted to be withdrawn, the highest bidder might be made the lowest by the withdrawal of all other bids, thus inducing fraud. *Kimball v. Hewitt*, 2 N. Y. Supp. 697; affirmed, on other questions, 3 N. Y. Supp. 756.

See also concurring opinion of Ingraham, J., in *City of N. Y. v. Seely-Taylor Co.*, 149 A. D. 98, 133 N. Y. Supp. 808.

The case of *Kimball v. Hewitt* does not appear to have been referred to in any of the later decisions. And the law now appears to be settled:

(1.) That if without cause the bidder refuses to enter into the contract after the acceptance of his bid, the amount of damages to which he can be subjected by reason of his default is limited to the amount of the deposit required to be furnished with the bid, *i. e.*, the amount of the liquidated damages and not the actual damages sustained. *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808, 149 A. D. 98, affirmed 208 N. Y. 548.

(2.) That where there has been an error in submitting the bid, in the event of an action brought by a

municipality to recover damages for a failure of a contractor to enter into the contract, the contractor may by answer plead as a defense an inadvertent error made in submitting the bid and contend that therefore the contractor never consciously or intentionally entered into such an agreement as claimed, the apparent agreement being the result of an honest mistake. It is not necessary under such circumstances for the contractor to bring an independent action in equity to rescind the contract, since the contention of the contractor is that what appears upon its face to be a contract shall be held to be no contract at all. *City of New York v. Dowd Lumber Co.*, 140 A. D. 359, 125 N. Y. Supp. 394.

(3.) The contractor may, in the event of an honest error in the preparation of the bid, bring an action in equity to have the contract rescinded even after the acceptance of the bid by the city. In the case of *Harper v. City of Newburgh*, 139 N. Y. Supp. 1057, 79 Misc. 299, where the plaintiff made a mistake in a bid which it submitted to the defendant, and sought to rescind the contract after the acceptance of the bid, and to recover the amount of the deposit, the Special Term held as follows:

“ Under the circumstances, it would seem that justice and equity required a return to the plaintiff of its deposit, but it seems that the law is the other way, and that the plaintiff cannot recover its deposit after the defendant has acted upon the bid and awarded the contract, unless there was a mutual mistake, or a mistake on one side and fraud or bad faith on the other. There is no claim that there was a mutual mistake nor does the plaintiff contend for any fraud, deceit or bad faith on defendant's part. The mistake or error in the bid was not apparent on its face, nor was the defendant's

attention called to it until after it had been accepted and the contract awarded.

“ Under these circumstances, it seems that the awarding of the work to the plaintiff made a complete contract, which is binding upon both parties, and from which neither may escape, except upon proof of fraud or bad faith or mutual mistake. *City of New York v. Seely-Taylor Co.*, 149 A. D. 98, 133 N. Y. Supp. 808.”

But the judgment was reversed by the Appellate Division by decision reported in 145 N. Y. Supp. 59, 159 A. D. 695, the court saying:

“ Yet there can be a rescission of a contract for unilateral mistake. The rule stated by the learned Special Term applies to reformation (*Moran v. McLarty*, 75 N. Y. 25), for reformation affords a contract. And consequently, when reformation is sought for the mistake of one party only, it is essential that fraud or inequitable conduct be found in the other, else the court, in determining that there is a contract at the instance of one, might be doing right to that one and equal wrong to the other when without legal fault. Pomeroy's Eq. Jur., vol. 6; Equitable Remedies, vol. 2, § 676, and note 5, citing Ames, C. J., in *Diman v. Providence, W. & B. R. R. Co.*, 5 R. I. 130. Pomeroy (*supra*) says that in such a case the ground of jurisdiction is fraud of the defendant rather than mere mistake of the plaintiff. But in rescission no contract remains, for there was in the eye of the law no meeting of the minds at all. Hence the court may rescind the apparent contract for the mistake of one party only, without a finding of fraud or inequitable conduct in the other. *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395, cited and approved in *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 136 N. Y. Supp. 625; *City of New York v. Dowd Lumber Co.*, 140

A. D. 358, 125 N. Y. Supp. 394, especially citing the rule in *Singer v. Grand Rapids Co.*, 117 Ga. 86, 94, 43 S. E. 755; *Smith v. Mackin*, 4 Lans. 41; Pomeroy's Eq. Jur., vol. 2 (3d Ed.), 870; Halsbury's Law of Eng., vols. 21, 17."

"I see no legal reason, then, why a court of equity, in the exercise of its discretion, could not have afforded rescission and a refund of the deposit within the principles of *City of New York v. Dowd Lumber Co.*, 140 A. D. 359, 125 N. Y. Supp. 394; *Moffett, Hodgkins & Clarke v. Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108. *Board of School Commissioners of City of Indianapolis v. Bender*, 36 Ind. App. 164, 72 N. E. 154, is quite in point. I think that there should be a new trial, whereat the court is free to award such equitable relief, in its discretion, as it deems due to the plaintiff. I do not decide that the plaintiff is absolutely entitled to it, for I have no intention to fetter the court. The learned Special Term relied largely upon *City of New York v. Seely-Taylor Co.*, 149 A. D. 98, 133 N. Y. Supp. 808, affirmed 208 N. Y. 548, 101 N. E. 1098. In that case the contractor, as in this case, erred in his figures and refused to execute a contract. But that case was an action at law against the contractor and his bondsman for damages measured by the difference between his bid and that of the next lowest bidder who became the contractor, and the city was dismissed, for the court held that the damages were limited to the deposit made with the bid. In the opinion it was said that there was a legal obligation upon the contractor, his bid having been accepted, to execute a contract. If this litigation was like unto that case, and it appeared that this contractor had but refused to execute a contract and that the charter provision as to the deposit had been similar to the charter

provision in this case, then the expression might be applicable. But in this case the contractor seeks affirmative relief in the equity side of the court against any existing or apparent legal obligation to execute a contract, and if the court grants such relief I fail, as I have said, to perceive why he must be held in damages as for a breach of that obligation which would not exist in the eye of the court. In fine, this contractor seeks the relief which the court in the *City of New York v. Seely-Taylor Co.* case (*supra*) says might have been sought, but was not, by the contractor in that case. See 149 A. D., page 102, 133 N. Y. Supp. 808."

See also *Northeastern Const. Co. v. Town of North Hempstead*, 121 A. D. 187, 105 N. Y. Supp. 581; *Davin v. City of Syracuse*, 69 Misc. 285, 126 N. Y. Supp. 1002; *Buckley Engineering Co. v. McCall*, 145 N. Y. Supp. 525.

§ 5. Lowest bid.

The provisions for the award to the lowest bidder in cases of municipal contracts are intended for the benefit of the taxpayer and not the private individual, and the right to reject all bids seems to be absolute, even in the absence of a statutory provision to that effect as in § 419, New York Charter. *Walsh v. Mayor of New York*, 113 N. Y. 145.

No contractual relation exists between the parties until after the award of the contract. *Molloy v. The City of New Rochelle*, 108 N. Y. Supp. 120, 123 A. D. 642; *Kinsella v. Auburn*, 7 N. Y. Supp. 317. And no right of action for breach of contract can accrue to the bidder until after such award.

"The mere fact that a person who has bid is the lowest bidder and knows that fact does not constitute

an award to him, nor does the mere arithmetical operation of ascertaining which bid is lowest constitute an award. The award requires the exercise on the part of the officer charged with that duty of judgment and discretion and must be manifested by some formal official act on his part." *Erving v. Mayor of New York*, 131 N. Y. 133.

But under provisions similar to those cited from § 419 of the New York Charter (see § 2 of text), if the contract is awarded to anyone it must be to the lowest bidder, in the absence of a resolution of the Board of Estimate and Apportionment permitting an award to a bidder other than the lowest. But it is not necessary that the awarding official shall determine which is the lowest bidder in the event that all bids are rejected. *People ex rel. McKeever v. Willis*, 39 N. Y. Supp. 987, 6 A. D. 231; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631.

The term "lowest qualified bidder" as used in the statute means little other than that the bidder must deposit with his bid the security required. The legislature has said that a bidder who can qualify to this extent is qualified, and in effect that the forfeiture to the city of this deposit as liquidated damages is sufficient protection against "stray" bids or unqualified bidders.

§ 6. The Award.

The award of the contract to a bidder, however, constitutes a "contract to contract" for the work proposed, and gives to the successful bidder a right of action for breach thereof, provided that the awarding officer possesses the authority to enter into such a contract. Upon the later refusal of the municipal authorities to execute a contract with him, the bidder has a

right of action to recover as damages for such breach, the amount of profit he would have made if the contract had been entered into and performed by him. *Williams v. City of New York*, 104 N. Y. Supp. 14, 118 A. D. 756, affirmed 192 N. Y. 541; *Van Arsdale v. Justice*, 133 N. Y. Supp. 661, 75 Misc. 495.

See also *Durkin v. City of New York*, 96 N. Y. Supp. 1059, 49 Misc. 114.

And after a municipal official has awarded a contract, and so notified the bidder, he cannot reject all bids and refuse to execute the contract with the successful bidder. *Lynch v. Mayor of New York*, 37 N. Y. Supp. 798, 2 A. D. 213; *Beckwith v. City of New York*, 106 N. Y. Supp. 175, 121 A. D. 462.

Nor can the city by resolution upon reconsideration, decide to discontinue the work and thus escape liability for breach of contract. But mandamus will not lie to compel the execution of the contract. *People ex rel. Ryan v. Aldridge*, 31 N. Y. Supp. 920, 83 Hun, 279.

See also *Lord v. Thomas*, 64 N. Y. 107; *People ex rel. Graves v. Sohmer*, 207 N. Y. 450.

No written contract is necessary between the bidder and the officer of the municipality, other than the resolution or minutes of the municipal board or officer awarding the contract, which sufficiently comply with the statute of frauds. *Argus Co. v. Mayor of Albany*, 55 N. Y. 495; *Horgan & Slattery v. City of New York*, 100 N. Y. Supp. 68, 114 A. D. 555; *North River E. L. & Power Co. v. City of New York*, 62 N. Y. Supp. 726, 48 A. D. 14.

But though the contract must be awarded by the head of department, or authorized contracting officials, where the head of department is a board of more than one member, apparently a majority may make the award (§ 1541, New York Charter) and certainly they

may delegate their authority to one member to execute the contract on behalf of all. In *Paul v. City of New York*, 61 N. Y. Supp. 570, 46 A. D. 69, the Park Board of three members awarded a contract and delegated one member to investigate the quality of the material, and execute the necessary contract. The court said:

“ There is no express provision of the statute as to the individual who is to execute the formal contract, and while the contract must be awarded by the head of department, the mere formal execution of the instrument evidencing the contract that has been made before is not illegal because not signed by each of the commissioners who constituted the park board.”

See also *Boots v. Washburn*, 79 N. Y. 207.

As to the legal effect of a seal upon a contract with a municipal corporation, see *Peterson v. City of New York*, 194 N. Y. 437, where it was held that the seal extended the time within which action might be brought, and that there is no presumption that the officers have exceeded their authority by affixing such seal. See “ Modification and Rescission,” § 45.

§ 7. That a contract with a municipal corporation has been awarded and executed, apparently in valid form, is, however, no assurance that it may not be held to be invalid, on any of the following general grounds:

(a.) Because the moneys to meet the expense to be thereby incurred have not been appropriated.

(b.) Because the specifications are improper and the apparent lowest bidder is not the actual lowest bidder, and authority is lacking upon the part of the officers awarding the contract.

(c.) Because of a failure to comply with statutory requirements in some essential particulars; though mere irregularities may be waived.

§ 8. The moneys to meet the expenses to be incurred in the execution of a contract must have been appropriated before the contract is awarded.

In the City of New York, the centralization of power is found in the Board of Estimate and Apportionment, which annually receives the estimates of required expenses from each of the administrative bodies having in charge the various branches of the city government, and apportions to each the amount necessary in the judgment of the board for its maintenance. The repeated admonition that no expense shall be incurred unless an appropriation shall have been previously made therefor, and that no valid claim against the city can arise or exist in excess of the amount appropriated for the special purpose, makes imperative that every contract to which the city is a party shall come directly or indirectly under the scrutiny of this board. Thus classified the contract may be incepted in any of three ways:

First.—By resolution of the Board of Estimate and Apportionment. (See N. Y. Charter, §§ 242, 243 and 169.)

Second.—By ordinance of the Board of Aldermen and concurring resolution by the Board of Estimate and Apportionment. (See N. Y. Charter, § 47.)

Third.—By resolution of the “local board of improvements” upon petition, and the concurring resolution of the Board of Estimate and Apportionment. (See N. Y. Charter, §§ 426 to 434.)

But note that the approval of the Board of Estimate and Apportionment is not necessary in certain cases where the expense to be incurred does not exceed two thousand dollars. (See N. Y. Charter, § 435.)

Accordingly a general rule applicable to the formation of contracts to which a municipal corporation is

a party may be stated: That no valid contract can be formed unless the money to pay the expense to be thereby incurred has been previously appropriated.

In conformity with this principle the following statutory citations are of interest:

SECOND CLASS CITIES LAW.

§ 79. Contracts and expenditures prohibited.

"No officer, board or department shall, during any fiscal year, expend or contract to be expended, any money or incur any liability, or enter into any contract which, by its terms, involves the expenditure of money for any of the purposes for which provision is made in the annual estimate in excess of the amounts appropriated in said estimate, as adopted by the common council, for such officer, board, department or purpose, for such fiscal year. Any contract, verbal or written, made in violation of this section shall be null and void as to the city." . . .

FROM THE NEW YORK CITY CHARTER:

"Majority of boards or departments; quorum; powers.

§ 1541. A majority of the members of a board in any department of the city government, and also of the board for the revision of assessments, shall constitute a quorum to fully perform and discharge any act or duty authorized, possessed by or imposed upon any department or any board aforesaid, and with the same legal effect as if said member of any such board aforesaid had been present, except as herein otherwise specially provided. Each board may, except as herein otherwise provided, choose, in its own pleasure, one of its members who shall be its president, and one who shall be its treasurer and may appoint a chief clerk or secretary. No expense shall be incurred by any of the departments, boards or officers thereof, unless an appropriation shall have been previously made covering such expense nor any expense in excess of the sum appropriated in accordance with law. This restriction shall not apply to contracts for the purchase of coal which contracts shall not extend for a longer period than one year." . . .

"Expenses not to exceed appropriation.

§ 1542. It shall be the duty of the heads of all departments and of all officers of said city, and of all boards and officers charged with the duty of expending or incurring obligations payable out of the moneys raised by tax in said city, or any of the counties contained within its territorial limits, so to regulate such expenditures for any purpose or object, that the same shall not in any one year exceed the amount appropriated by the board of estimate and apportionment for such purpose or

object; and no charge, claim or liability shall exist or arise against said city, or any of the counties contained within its territorial limits, for any sum in excess of the amount appropriated for the several purposes. It shall be lawful, however, for the board of estimate and apportionment in its discretion, and upon the certificate of the district attorney of any such county that the public interests demand for the proper conduct of a criminal action of exceptional difficulty that an additional appropriation be made for that purpose, to make such appropriation and to authorize the comptroller to issue special revenue bonds to provide the necessary means therefor."

§ 149. "No contract hereafter made, the expense of the execution of which is not by law or ordinance, in whole or in part, to be paid by assessments upon the property benefited, shall be binding or of any force, unless the comptroller shall indorse thereon his certificate that there remains unexpended and unapplied, as herein provided a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same, . . . And such indorsement shall be sufficient evidence of such appropriation or fund in any action."

The distinction between § 1541 and § 149 is pointed out in *Packard v. City of New York*, 137 N. Y. Supp. 9, 151 A. D. 941, wherein it is held that the former section does not apply to an excavation contract at a fixed price per yard for work, the exact cost of which cannot be ascertained until after completion and measurement. Such contracts are provided for under § 149, which requires an endorsement on the contract that there is a balance of appropriation sufficient to pay "the estimated expenses of executing such contract as certified by the officer making the same."

See also *Clarke Co. v. Board of Education*, 156 A. D. 842, 142 N. Y. Supp. 106; *Matter of Morris & Cummings Dredging Co.*, 116 A. D. 257, 101 N. Y. Supp. 726.

It is to be noted that it is not necessary that the actual cash to meet the payments which may grow due under the contract shall be on hand at the time of the execution of the contract. The best interests of the municipality may be promoted by not issuing bonds

or corporate stock in advance of the consummation of contracts, and paying interest thereon during the periods when the money is not actually needed.

“As the common council was given authority to issue bonds from time to time for a specific purpose, it could probably make binding contracts before actually authorizing the issue of any such bonds and thereupon be compelled to issue the necessary bonds to meet such contract obligations.” *Van Arsdale v. Justice, Comptroller, City of Buffalo*, 133 N. Y. Supp. 661, 75 Misc. 495.

See also *Davidson v. Village of White Plains*, 105 N. Y. Supp. 803, 121 A. D. 287.

And in determining what balance is remaining and available for application on account of any contract to be paid for by an appropriation of bonds, no deduction is to be made for interest charges on the bonds, and all moneys within the appropriation not already set apart for some other purpose are to be considered as available for the payments under the proposed contract. *People ex rel. Phoenix Const. Co. v. Hayle*, 133 N. Y. Supp. 671, 75 Misc. 515; *Kingsley v. City of Brooklyn*, 78 N. Y. at 217.

Neither can a bid be accepted where the appropriation is insufficient to meet the contract price, subject to a further future appropriation sufficient to meet the deficit, by the Board of Aldermen and Board of Estimate and Apportionment, under the sections of the charter cited.

“The board could not validate a bid in excess of the amount previously authorized. The bid was invalid when made, and no subsequent action by the board or by any other board could breathe into it the breath of life.” *Williams v. City of New York*, 104 N. Y. Supp. 14, 118 A. D. 756, affirmed 192 N. Y. 541.

See also *Horgan & Slattery v. City of New York*, 100 N. Y. Supp. 68, 114 A. D. 555; *Clarke Co. v. Board of Education*, 156 A. D. 842, 142 N. Y. Supp. 106; *Gardner v. Town of Cameron*, 155 A. D. 750, 140 N. Y. Supp. 634.

But where there are sufficient moneys available to meet the contract price, and the contract has been awarded but no endorsement is made thereon to that effect, as required by § 149, New York Charter, because the officer awarding the contract later refuses to forward it to the comptroller for that purpose, the bidder may nevertheless recover against the city in an action for breach of contract.

“ It can be no defense that the comptroller never did what he was prevented from doing by the breach complained of . . . The comptroller could have been compelled by mandamus to make the certificate in case of a refusal, for his duty was purely ministerial.” *Beckwith v. City of New York*, 121 A. D. 462, 106 N. Y. Supp. 175.

The comptroller of the City of New York cannot be compelled by mandamus to certify that there are funds available for the carrying out of a contract in accordance with the provisions of § 149 of the charter when such is not the case, even though such funds were available when the contract was entered into. *People ex rel. Gibbons v. Coler*, 41 A. D. 463, 58 N. Y. Supp. 988.

See also *Wakefield v. Brophy*, 122 N. Y. Supp. 632, 67 Misc. 298; under Village Law; *Van Dolsen v. Board of Education*, 162 N. Y. 446; *Donovan v. City of New York*, 33 N. Y. 290; *Nelson v. Mayor of New York*, 63 N. Y. 535; *Kronsbein v. City of Rochester*, 76 A. D. 494, 78 N. Y. Supp. 813.

§ 9. The proposals advertised and the specifications upon which bids are founded must be in proper form to permit of actual competition, and to secure the lowest bidder in competition with others, although reasonable restrictions are in certain cases permitted.

The term "lowest bidder" as used in the statutes does not mean the apparent lowest bidder, but the actual lowest bidder as determined in accordance with the provision of the statutes. Accordingly the fact that the contract is to be made must be advertised as prescribed by § 419 of the New York Charter, and the proposals for estimates must be in such form as the head of department shall prescribe, and in addition to details as to time and manner of making the estimate as set forth in § 511 of the Ordinances of the City of New York, must state "the quantity and quality of the supplies or nature and extent as near as possible of the work required." *Boyce v. Grant, Mayor*, 12 N. Y. Supp. 801.

But while the form of bid and method of executing the same may be prescribed by the head of department advertising for the same, his discretion in the matter is subject to the limitations in the statute and the city ordinances, and he cannot make arbitrary rules and upon non-compliance by the bidder reject his bid as informal, as was attempted in the case of *Daly v. O'Brien*, 112 N. Y. Supp. 304. There the commissioner prescribed a rule that bids submitted by corporations were to be signed in the name of the corporation, by a duly authorized officer or agent, who must also subscribe his own name and the title of his office, and where practical affix the corporate seal. The lowest bid was signed ———, vice-president, and was rejected as informal. The court held that the com-

missioner had no authority to make such a ruling, and said:

“ In sections 419 and 420 thereof the legislature has established such rules as it was willing to express, and committed by the provisions of section 419 extensions, elaborations or detail to the establishment by ordinance or resolution of the Board of Aldermen. At all events I can find no provision of law and I have no proof of an ordinance or resolution requiring bids to be signed.”

“ The legislature deemed a retention as liquidated damages of a deposit of money in an amount not less than three nor more than five per cent. of the amount of the bond required by the commissioner as adequate protection ” against fictitious bids.

See also *In re Clamp*, 68 N. Y. Supp. 345, 33 Misc. 250, with reference to signing bids.

§ 10. Specifications must be definite.

As is apparent from the statutes, the object in requiring a call for bids prior to the making of a contract is to induce competition, to prevent fraud and favoritism, and to secure the lowest possible price for the desired work. In order that this object may be attained it is essential that a definite statement be given to prospective bidders showing precisely what work is to be performed, or what supplies are desired, so that all may with an equal knowledge of what is required make offers for the performance of the same contract. The bidder must know what is desired so that he may offer to supply that desire and not something else, to the end that when all bids are in, the only duty remaining for the official to perform will be a comparison of the prices to determine which is the lowest bid. Thus it is made unnecessary and impos-

sible for the official awarding the contract to exercise any discretion or judgment in reaching his determination of which bid is lowest, and the possibility of favoritism or fraud is minimized.

All bidders must be compelled by the specifications to offer the same kind of work or supplies. If the specifications are not in such form as to accomplish this end, any contract awarded thereon will be void. In *Gage v. The City of New York*, 97 N. Y. Supp. 157, 110 A. D. 403, the specifications for the building of a bridge provided that certain portions of the work were to be done in "high carbon steel" or in "nickel steel," but failed to state definitely whether the contractor or bridge commissioner was to make the selection. There was a large difference in the prices of the two, and also in the quantity of each kind which would be required. The contract awarded on the specifications to the apparent lowest bidder was held to be void. The court concluded the specifications were so indefinite as to void the contract, and said that either each bidder must be required to make a definite bid in the alternative, allowing the selection to lie with the city, or some other method must be devised which would insure actual competition, and obviate the possibility of a favored bidder possessed of advance information as to what selection would be made, from having the advantage to this extent over those bidding without such knowledge.

In *Grace v. Forbes*, 118 N. Y. Supp. 1062, 64 Misc. 130, the action was to restrain the letting of the contract as in violation of the Second Class Cities Law, because the specifications, while apparently calling for competition, were in such form as to prohibit any but one patentee from meeting the requirements called for. The court there held that the opportunity for

competition must be in fact as well as in form, and continuing said, at page 1067:

“The board of contract and supply must decide what work it wishes done and how it wishes it done before it calls for bids. . . . In other words, the spirit of the statute requires that the plan of the work to be done be adopted before proposals are invited, to the end that all bids may be for the same thing and that nothing may remain to be determined by the board but the question as to which are the lowest figures. The statute implies a common standard by which bidders are to be measured. It implies plans previously adopted which are to be open to all. It implies a chance to bid for a contract which is to be adopted; not that a contract may be adopted after bids are in and in view of them.”

Indefiniteness in the specifications and the retention by the municipal officials of the right to alter the contract or specifications after the award, or the letting of a contract containing options with reference to the selection of materials to be later agreed upon, is condemned strongly in *Nelson v. Mayor of New York*, 131 N. Y. 4. There the advertisement stated that the commissioner reserved the right to increase or diminish the gross quantity or the quantity of each of a large number of different kinds of pipe to an amount not exceeding 30 per cent. of the gross amount of the contract, and the time of delivery was to be extended or diminished in the ratio of the increase or diminution. The court there said:

“If every bidder for the contract put fair, honest, *bona fide* prices upon each kind of pipe to be furnished, this clause could work no mischief or injustice. But it gave opportunity, just such opportunity as could be desired by a person who wished, in collusion with the officers of the department of public works, to put

in what is called an unbalanced bid — to perpetrate a fraud upon the city. No one not in fraudulent complicity with the city officials could, with this clause in operation, safely put in an unbalanced bid.”

In the case of *People ex rel. Ream Pavement Co. v. Board of Improvement*, 43 N. Y. 227, the board advertised for a number of different kinds of pavement. Ten bids were received, but no two were for the same kind of pavement. It was accordingly impossible for the board to tell which was the lowest bid except after considering which kind was the most durable and advantageous pavement for use, and to what extent superior to the others, and then comparing those qualities with like qualities of others, considering the price of each, and thus determining which kind was most advantageous to the public. The court held:

“ Work should be competed for as to price by contractors, and this should be done in such a way that the lowest bidder could be determined by calculation without any exercise of judgment as to the relative advantages of different kinds of pavement.”

And in *People v. Scannell*, 82 N. Y. Supp. 362, 40 Misc. 297, the court said:

“ The only test of bids made under the charter is that of price. It is the duty of the commissioner inviting bids for supplies to clearly indicate by standard, description, test or sample the kind and quality of goods which he requires. Every bidder will be presumed to offer goods of the kind and quality thus indicated, and thus the price at which each offers to supply such goods affords the only standard by which the bids can be compared to ascertain which is the lowest.”

In *Hart v. City of New York*, 201 N. Y. 45, outside of a few definite requirements the contractor was allowed “ to select any method of sewage disposal and construct and arrange building appurtenances, such as

tanks for sedimentation, filtering pipes and valves, foundations, engines, boilers, etc., according to any system he desired and according to plans and specifications to be submitted by him with his bid." The court held:

"It is apparent from this general statement how indefinite was the description of the work to be done, and how practically impossible it was for bidders to compete with one another on a common basis of work to be done and materials to be furnished, and how open to the discretion and judgment of the municipal officers it was to determine which was the lowest bid. . . . It seems clear that such purported specifications cannot possibly furnish the basis for real competitive bids which may be subjected to an intelligent and uniform test for the purpose of determining which is lowest and therefore within the statute."

The court suggests that where there are possible various different standards or systems, such as in this case, the municipal officers must do one of two things. Either they must adopt the most promising system and prepare specifications for that one system, or else, assuming that it is permissible to call for bids on any one of different systems, plans and specifications should have been adopted applicable to each system upon which bids are to be received. See also *Matter of Morris & Cummings Dredging Co.*, 116 A. D. 257, 101 N. Y. Supp. 726; *Kuhn v. City of Buffalo*, 145 N. Y. Supp. 910.

Attention is directed to the following statute:

GENERAL MUNICIPAL LAW.

"§ 88. Separate specifications for certain contract work.

Every officer, board, department, commission or commissions, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, construction or alteration of buildings in any county or city, or the borough of any city, when the entire cost of

such work shall exceed one thousand dollars, must have prepared separate specifications for each of the following branches of work to be performed:

1. Plumbing and gas fitting.
2. Steam heating, hot water and ventilating apparatus.

Such specifications must be so drawn as to permit separate and independent bidding upon each of the classes of work enumerated in the above subdivisions. All contracts hereafter awarded by any county, city or borough, or a department, board, commission, or commissioner or officer thereof, for the erection, construction or alteration of buildings or any part thereof, shall award the respective work specified in the above subdivisions separately to responsible and reliable persons, firms or corporations. Nothing in this section shall be construed to prevent the authorities in charge of any county or municipal building from performing any such branches of work by or through their regular employees, or in the case of public institutions, by the inmates thereof." (Added by Laws 1912, Chapter 514.)

§ 11. Alternative bids.

That it is permissible for the municipal officials to call for bids in the alternative, leaving the selection of one or the other of two proposed methods or systems of doing the desired work to be determined after the receipt of bids, is held in *Luter v. Briggs*, 64 N. Y. 404. There the bids were called for on both open work and tunneling. The board thereafter decided to have all work tunneled, and awarded the contract in the revised form without readvertising for bids. The contract was sustained.

See also *Schieffelin v. City of New York*, 122 N. Y. Supp. 502, 65 Misc. 609.

But while the law requires that the specifications must be definite, there is a possibility that the municipal officers may in a sense go to the other extreme and prevent free competition by offering specifications fixing the price to be paid for one branch of the work, and thus void the resulting contract. Regarding such specifications, the court, in *Matter of Merriam*, 84 N. Y. 596, said:

“ The price for rock excavation being fixed by the commissioner and being a material and important part of the work, it was withheld from competition in violation of the statute.”

See also *Matter of Manhattan Savings Institution*, 82 N. Y. 142; *Matter of Mahan*, 81 N. Y. 621; *Moynahan v. Birkett*, 31 N. Y. Supp. 293, 81 Hun 395.

But the specifications may contain a provision, however useless it may be, to the effect that the cost of one branch of work in the contract must bear a certain ratio to the cost of another, as was done in *Matter of Marsh*, 83 N. Y. 431. There the specifications provided that one-quarter of the amount bid for rock excavation would be allowed for earth excavation. The court held that no price was fixed for any kind of work and no part of the work withdrawn from competition. And the bid of one who fixed a price for earth excavation greater than one-quarter of the cost of rock excavation was held to have been properly rejected.

§ 12. Lowest bid at time of opening. Unbalanced bids.

The term “ lowest bidder ” means the lowest bidder as determined upon the estimates in the specifications for the entire contract; *Brady v. City of New York*, 20 N. Y. 312; at the time of the opening of the bids, before and not after the execution of the contract. And it cannot be set up to defeat the contract that it developed after the performance that the bid which appeared lowest was not in reality the lowest, and that the cost of performance would have been less if another bid had been accepted.

It is immaterial that the bidder at the time of filing his bid may have knowledge that the estimates contained in the specifications are erroneous. The contractor is entitled to the benefit of such superior knowl-

edge, and in the absence of fraud or collusion with the municipal officers in the making of the contract, it cannot be used to defeat his recovery upon the contract.

In *Reilly v. Mayor of New York*, 111 N. Y. 473, the city surveyor made an erroneous estimate of the quantity of earth and rock excavation on a contract for grading a street. The plaintiff by his superior knowledge obtained an advantageous contract, and while his bid appeared lowest upon the estimates, it was in reality higher than others. The court said:

“ The contention is that the plaintiff was not in fact the lowest bidder. The doctrine involved in that theory is that the city having through its surveyor made an estimate founded upon a surface examination of the locality and being contented with it, may invite bids upon that basis for the actual work to be done, award the contract to one who is the lowest bidder tested by the proposals, hold him to the contract and require of him its performance, and when it has been completed annul it because the actual so varies from the estimated result as to make his bid in fact higher than others which had seemed to be above his own. We cannot approve that doctrine. Its injustice is very great. Under the law the bids are to be made and the contracts awarded upon estimates of the work to be done, and he who is the lowest bidder upon these estimates is the lowest bidder under the law and does not lose his right because the estimates are erroneous. He may lose it through fraud, but if guilty of none, the city cannot urge against him its own ignorance or error.”

See also *Mayor of New York v. Brady*, 115 N. Y. 599.

But where an unbalanced bid is submitted and the contract awarded thereon, and it develops that there was collusion between the bidder and the contracting

officials, the contract will be held to be void on the ground of fraud. But the mere fact that an unbalanced bid is accepted is in itself no evidence of fraud. *Matter of Anderson*, 109 N. Y. 557.

§ 13. Lowest bid as made, not a higher bid reduced after opening.

As has been stated, the "lowest bid" to be accepted must be the bid which is lowest at the time of the opening of the bids. The bid when once made must stand as made, and is not subject to alteration after opening, even though the effect of the alteration be to lower the price to the advantage of the city. *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65.

§ 14. Reasonable restrictions may be imposed.

But while the authority of the municipal officials in the preparation of the specifications is limited as hereinbefore set forth, they have full authority to incorporate in the specifications reasonable restrictions upon bidders, where such restrictions will tend to promote its interest or to protect the city against incompetent and irresponsible bidders.

It may be made one of the pre-requisites to submitting a bid, that a sample of the proposed material be furnished for examination before the opening of the bids (N. Y. City Ordinances, § 517), and the bidder may be compelled to submit proof of the successful use of an untried material proposed, for a stated period of time. *Berghoffen v. The City of New York*, 64 N. Y. Supp. 1082, 31 Misc. 205.

Or it may be provided that the bids are limited to such parties as "have the requisite plant and facilities which have been on work of similar character for at least one year," in the case of a large undertaking such

as a bridge. *Knowles v. The City of New York*, 75 N. Y. Supp. 189, 37 Misc. 195, affirmed 176 N. Y. 430.

Likewise the city may provide in a contract for the construction of a bridge that a particular kind of steel must be used in part of the work, even though it is produced by but one manufacturer, provided the bidder is left free to purchase the product in the open market. *Gage v. City of New York*, 110 A. D. 403, 97 N. Y. Supp. 157.

The opinion in *Knowles v. City of New York*, 75 N. Y. Supp. 189, 37 Misc. 195, attempts to state a definite rule governing these cases as follows:

“Free competition which the law requires officials to secure does not prevent them from making restrictions as to the kind and quality of materials to be used. Free competition in respect of the article in kind, quality and even manufacture, decided upon by them in the exercise of their judgment and discretion, is all that is required.”

“Where the product of a particular manufacturer is of generally recognized excellence, public officials who are required by statute to award contracts to the lowest bidder may like private individuals call for it in proposals for bids in preference to similar products.”

In considering this rule, however, it should be noted that one of the cases upon which the court bases its opinion, *Smith v. City of Syracuse*, was later reversed in 161 N. Y. 484; and also that while the judgment in *Knowles v. City of New York* was affirmed by the Court of Appeals in 176 N. Y. 430, the opinion was based largely upon the ground that the commissioners who entered into the contract were acting under a special act of the legislature and were not therefore

bound by the limitations of § 419 of the New York Charter. On this point see also § 26.

This rule as thus laid down cannot therefore be taken too literally nor applied as a broad general proposition. The circumstances under which it was made must be considered to note its qualifications. The contract was for the construction of a large steel bridge. The steel which was the material which was limited as to kind, was but one item out of a large number of different materials which went to make up the entire structure. Free competition, which is always the final test of validity, could still be had on the remaining material and the large amount of labor necessary in constructing the bridge, as well as to a certain extent upon the steel itself, for no provision was made that it had to be purchased from a particular manufacturer or at a fixed price. The case therefore differs from those in which the work is of small magnitude, with a smaller variety of materials and where by the selection of a particular manufacture of material in the specifications, competition is for all practical purposes shut off and the bidding limited to that particular manufacturer.

See also *Smith v. City of Syracuse*, 161 N. Y. 484.

§ 15. Monopolies excluded.

Whenever the limitations are such as must surely result in the stifling of competition and the awarding of a contract to the owners of a monopoly, the resulting contract is void, *Boone v. City of Utica*, 5 Misc. 391, 26 N. Y. Supp. 932; even though the contract is let as the result of a petition from property owners requesting that the particular monopolized article be favored.

§ 16. The resulting contract may also be held to be invalid if it does not comply with the proposals or specifications, or if there is a failure to comply with a statute or lack of authority under the statutes on the part of the officers. But mere irregularities are held to be waived.

Thus it was held, when bids were called for on plans and specifications for the construction of a hospital building, and the proposals by the trustees recited the resolutions of the Board of Aldermen and Board of Estimate and Apportionment, providing for the issuance of corporate stock to the extent of \$39,000.00 in payment therefor, and the plaintiff was awarded the contract as the lowest bidder at \$49,000.00. No contract could result, *Williams v. The City of New York*, 104 N. Y. Supp. 14, 118 A. D. 756, 192 N. Y. 541; not only because the appropriation was insufficient, but because the bid did not meet the requirements of the specifications. *Horgan & Slattery v. City of New York*, 114 A. D. 555, 100 N. Y. Supp. 68.

See also *Withers v. City of New York*, 107 N. Y. Supp. 955, 123 A. D. 283; *same case*, 86 N. Y. Supp. 1105, 92 A. D. 147.

Likewise where the specifications called for a rock excavation two feet in depth, and the officer in charge, after the advertisement calling for bids, provided in the contract for an excavation but one foot in depth, it was held that the contract was not binding on the city. *Bonesteel v. The City of New York*, 22 N. Y. 167.

As instances in which contracts were held to be void because of lack of authority of the officers to make the contract, see *Morarity v. The City of New York*, 110 N. Y. Supp. 842, 59 Misc. 204; *People ex rel. Graham v. Studwell*, 86 N. Y. Supp. 967, 91 A. D. 469; *Dady v. City of New York*, 121 N. Y. Supp. 860, 65 Misc. 382;

Lewis v. City of New York, 94 N. Y. Supp. 710, 106 A. D. 454.

§ 17. Irregularities waived.

But mere irregularities may be waived when no damage can be inflicted or any wrong done to others thereby and it is clearly for the benefit of the city to do so. Such irregularities, for example, are a deposit of bids in the wrong bid box; the opening of bids on an adjourned day instead of on the day advertised; the improper verification of an undertaking by sureties; and the fact that the sureties are not worth the amount named in the undertaking.

In *McCord v. Lauterbach*, 91 A. D. 315, 86 N. Y. Supp. 503, the court said:

“All of the provisions both of the statute and of the rules and regulations which have been adopted for procuring genuine bids and responsible parties, are in the main for the benefit of the city and in order to prevent frauds upon it. They have not been adopted for the benefit of the bidder, but for the protection of the city, and it necessarily follows that the city to some extent at least has the right to waive irregularities when it is clearly for its benefit so to do, and when no damages will be inflicted upon it or wrong done to others thereby.”

Gage v. City of New York, 97 N. Y. Supp. 157, 110 A. D. 403; *Voght v. City of Buffalo*, 133 N. Y. 464; *Moore v. Mayor of New York*, 73 N. Y. 238; *Gilmore v. City of Utica*, 131 N. Y. 27.

A case of interest on this topic is *Abells v. The City of Syracuse*, 7 A. D. 501, 40 N. Y. Supp. 241. There the contract provided for the grading of a street at a fixed price per yard for each kind of work, and further, that “for all extra work done by written order of the

commissioner of public works, its actual reasonable cost to the contractor plus 15% of said cost." It became necessary to build a retaining wall which was not contemplated in the original contract, and the engineer in charge directed that it be done. There was no written order, but the work was accepted by the city. Action was brought to recover the value of the extra work. It was held that the commissioner could waive the necessity of the written order. It is difficult to reconcile this decision with the other authorities on similar questions, and the court seems to have abandoned sound principle in order to do justice to the contractor, who had acted in entire good faith in performing the services. There are two strong dissenting opinions, the reasoning in which appears to be more sound than that in the prevailing opinion. The case should not be relied upon too strongly as an authority, and after an attempt at distinction it was disregarded by the court in the case of *Dady v. The City of New York*, 121 N. Y. Supp. 860, 65 Misc. 382.

§ 18. Opening bids.

A statutory provision that the bids shall be opened on the day named in the notice or on such day as the council shall adjourn to, and that "the council shall determine which proposal is the most favorable," does not require that the determination shall be made at the meeting at which the bids are opened. *Lilienthal v. The City of Yonkers*, 39 N. Y. Supp. 1037, 6 A. D. 138. And this is so even though the statute provides that the officer shall "then" (upon the opening of bids) let the contract. "Then," as here used, means "thereafter." *Tingue v. Village of Port Chester*, 101 N. Y. 301.

Under § 419 of the New York Charter, it is re-

quired that all bids "shall be publicly opened by the officer or officers advertising for the same, and in the presence of the comptroller, but the opening shall not be postponed if the comptroller shall, after due notice, fail to attend."

See also § 516, Ordinances, City of New York.

In *People ex rel. Rodgers v. Coler*, 54 N. Y. Supp. 785, 35 A. D. 401, the court held:

"The absence of the comptroller may be excused, but the absence of the officer advertising for bids cannot be dispensed with. The legislature has been explicit in stating whose absence after due notice shall not postpone the opening of bids. It was manifestly intended that the officers mentioned in the statute must of necessity be present. These provisions are salutary in their nature and intended to prevent the manipulation of bids before they come into the hands of the officer who is to report the same to the comptroller, and there being no provision for action in the absence of certain officers, procedure without their presence is manifestly irregular and contrary to law. The opening of bids in the case at bar was a nullity."

See also *In re Rooney*, 56 N. Y. Supp. 483, 26 Misc. 73.

§ 19. Advertisements.

A statute requiring advertisement in a certain paper for a number of consecutive days means consecutive days on which the paper is published. The fact that the paper is not published on Sunday will not invalidate a contract under this ruling. *Bradley v. Van Wyck, Mayor*, 72 N. Y. Supp. 1034, 65 A. D. 293.

See also *Matter of Pennie*, 108 N. Y. 364.

§ 20. Officers not to be interested in contracts.**STATUTES.****General City Law.**

§ 3. OFFICERS NOT TO BE INTERESTED IN CONTRACTS. . . . "nor shall the mayor or any alderman, school commissioner or other public officer of any city be directly or indirectly interested either as principal, surety or otherwise, in any contract, the expense or consideration whereof is payable out of the city treasury."

Second Class Cities Law.

§ 19. RESTRICTIONS; OFFICERS NOT TO BE INTERESTED IN CONTRACTS. . . . "No member of the common council or other officer or employee of the city, or person receiving a salary or compensation from funds appropriated by the city, shall be interested directly or indirectly in any contract to which the city is a party, either as principal, surety or otherwise; nor shall any such member of the common council, city officer or employee or person, or his partner, or any agent, servant, or employee of such officer, employee or person or of the firm of which he is a partner, purchase from or sell to the city, or any officer thereof, any real or personal property for the use of the city, or any board or officer thereof, nor shall he be interested, directly or indirectly, in any work to be performed for, or services rendered to or for it, or in any sale to or from said city, or to any officer, board or person in its behalf. Any contract made in violation of any of these provisions shall be void. A person shall not be deemed to be interested in a contract, purchase or sale made by a corporation with, from or to the city solely by reason of the fact that he is a stockholder of such corporation. The term 'city officer' as used herein, however, shall not be deemed to include a commissioner of deeds."

Town Law.

§ 133. MEETING OF TOWN BOARD FOR AUDITING ACCOUNTS. . . . "No member of the town board or board of town auditors shall present a claim or demand against the town for audit which has been assigned to him by another, or for labor, services or material rendered or furnished by himself, or by another as his servant or agent or under contract with him, or any claim or demand of any name or nature wherein he has an interest, direct or indirect, excepting his per diem compensation for attendance upon meetings of the town board of said town and the fees allowed to him by law for services rendered in his official capacity; and no claim or demand in which a member has an interest or which is based wholly or partly on services or materials rendered or furnished by such member shall be audited or allowed by said board in favor of any person or corporation."

Village Law.

§ 332. "OFFICER NOT TO BE INTERESTED IN CONTRACTS. An officer shall not be directly or indirectly interested in a contract which he or a board of which he is a member is authorized to make on behalf of the village; nor in furnishing work or materials."

§ 333. "LIABILITY OF UNLAWFUL CONTRACTS. An officer or person who assumes to create a liability or appropriate money or property of the village without authority of law, or assents thereto, is personally liable for such debt, or to the village for such money or property.
. . ."

Penal Law.

§ 1868. "OFFICIALS NOT TO BE INTERESTED IN SALES, LEASES OR CONTRACTS. A public officer or school officer who is authorized to sell or lease any property or to make any contract in his official capacity, or to take part in making any such sale, lease or contract, who voluntarily becomes interested individually in such sale, lease or contract, directly or indirectly except in cases where such sale, lease or contract or payment under the same, is subject to audit or approval, by the commissioner of education is guilty of a misdemeanor."

New York Charter.

§ 36. "NO MEMBER ELIGIBLE TO ANY CITY OFFICE. No member of the board of aldermen shall, while serving as a member of such board, be eligible or be appointed to any other office under the city, nor shall any member of said board of aldermen while such be a contractor with or an employe of the city or of the board of aldermen in any capacity whatever."

§ 1533. "OFFICERS NOT TO BE INTERESTED IN CONTRACTS. No member of the board of aldermen, head of department, chief of bureau, deputy thereof or clerk therein, or other officer of the corporation, shall be or become interested directly or indirectly, as contracting party, partner, stockholder or otherwise, in or in the performance of any contract or work, the expense, price of consideration of which is payable from the city treasury.

"All such contracts in which any such person is or becomes interested as above described shall, at the option of the comptroller, be forfeited and void."

§ 1098. "SCHOOL OFFICERS NOT TO BE INTERESTED IN CONTRACTS; REMOVAL OF. The board of education shall have power to remove from office any school officer who shall have been directly or indirectly interested in the furnishing of any supplies or materials, or in the doing of any work or labor or in the sale or leasing of any real estate, or in any proposal, agreement or contract for any of these purposes, in any

case in which the price or consideration is to be paid, in whole, or in part, directly or indirectly, out of any school moneys, or who shall have received from any source whatever, any commission or compensation in connection with any of the matters aforesaid."

Prior to the enactment of any statutes on this subject the courts had held that contracts in which public officials were interested were void on the ground of public policy.

In the case of *Smith v. City of Albany*, 61 N. Y. 444, the court held:

"In bargaining for the city he could not be one of a party acting as an employer, and become himself by the same bargain an employee."

And in *Beebe v. Board of Supervisors of Sullivan Co.*, 19 N. Y. Supp. 629, 64 Hun 377, affirmed 142 N. Y. 631, the court said:

"The illegality of such contracts does not depend upon statutory requirements. They are illegal at common law. It is contrary to good morals and public policy to permit municipal officers of any kind to enter into contractual relations with the municipality of which they are officers."

And the fact that the officer in question failed to take any part in awarding the contract was held not to cure the evil.

Likewise, it has been held, where officers are secretly interested in contracts. *Heughes v. Board of Education*, 55 N. Y. Supp. 799, 37 A. D. 180; *Woodsworth v. Bennett*, 43 N. Y. 273.

But statutes prohibiting public officers from being interested in public contracts are now common, and are strictly construed; and where the question is raised the onus is on the contractor to show that the contract was just and fair. *Nicoll v. Sands*, 131 N. Y. 24.

Section 3 of the General City Law prohibits "any mayor, alderman, school officer or other public officer"

from being interested in any contract. This statute applies to all cities except New York, and contracts made in violation thereof are void and not voidable. Unless the option to void the contract is exercised, the contractor may complete his contract and recover the contract price for the services performed. *Donovan v. City of New York*, 33 N. Y. 293; *In re Clamp*, 68 N. Y. Supp. 345, 33 Misc. 250.

Section 1533 of the New York City Charter includes in the prohibition clerks as well as officers, but the contract is made voidable only at the option of the city comptroller.

Employees of a municipal corporation are not forbidden to contract with a municipality, but only those "officers" named in the statute. *Munnally v. Board of Education*, 92 N. Y. Supp. 286, 46 Misc. 477. For the distinction between officers and contractors, see *People ex rel. Collins v. McAneny*, 144 N. Y. Supp. 121.

But accession to office after the contract is made does not make the contract voidable. *Goodrich v. Board of Education*, 122 N. Y. Supp. 50, 137 A. D. 242.

The case of *People ex rel. Gaffney v. Mayer, Justice*, 84 N. Y. Supp. 817, 41 Misc. 368, arose under § 1533 of the New York Charter before its amendment. Gaffney, an alderman, had executed a contract with the city as president and stockholder of a corporation. It was held that he was not criminally liable under the statute, which, at the time of the offense, merely prohibited officers from being "directly or indirectly" interested. But he would be guilty under the statute in its present form.

In the case of *In re Village of Kenmore*, 110 N. Y. Supp. 1014, 59 Misc. 388, it was held that:

"A village treasurer is not a member of the board of trustees and not authorized to make contracts on

behalf of the city. Section 81, Village Law. The legislature did not think it necessary or desirable to prohibit all village officers from being interested in village contracts and so permits such officers to be interested in contracts where other officers of the village make the contract on behalf of the village."

§ 21. Exceptions.

To the general principles hereinbefore stated regarding the formation of public contracts, there are certain exceptions, which may be divided into two main groups as follows:

First.—Exceptions provided by statute or special legislation;

Second.—Exceptions by judicial decisions.

§ 22. Exceptions by statute.

The typical procedure provided for in § 419 of the New York Charter for the advertisement of proposals and the preparation of proper specifications and form of contract, must necessarily consume a considerable length of time. That statute itself recognizes that this process may at times be so unnecessarily burdensome, that it provides certain exceptions to the general rules, as follows:

(A). Where the Board of Aldermen by a three-quarter vote decrees otherwise. And where the work is to be let by contract, the lowest bid need not be accepted if the Board of Estimate and Apportionment decrees otherwise by a three-quarter vote.

(B). Where the expenditure involved does not exceed the sum of one thousand dollars, upon certificate of necessity for the expenditure by the head of department.

(C). Where extra work for the completion of a

contract properly awarded, is ordered by the official awarding the contract, a sum not exceeding 5% of the amount of the original contract may be expended without further contract or competition.

(D). Other exceptions are provided by the statutes creating and providing for the management of the various city departments.

(E). The general rule may also be superseded by the enactment of special legislation regulating the construction of some large and important public improvement, the very magnitude of which makes it wise that its supervision shall not be imposed on municipal officials.

§ 23. Exceptions created by the Board of Aldermen and Board of Estimate and Apportionment.

As an instance of when this discretionary authority may be properly exercised may be cited the case of a contract the performance of which necessitates the use of a patented article. If the subject-matter of the patent is of such generally recognized value that its use by the city is advantageous, the contract may be awarded to the patentee without competition, under the provisions cited. See *Warren Bros. Co. v. City of New York*, 190 N. Y. 308.

But the power thus vested in the boards named to provide exceptions to the general rule relative to the awarding of contracts, cannot be delegated to a commissioner or other subordinate officer, but must be exercised in each case by the boards named.

In *Phelps v. Mayor of New York*, 112 N. Y. 216, the court said:

“ This is eminently a discretionary power which cannot be delegated. It is their judgment which the law requires and not that of any officer they may

designate. There is no provision in the law itself authorizing them to delegate this power, and the case falls within the settled principle that powers of this description involving the exercise of judgment and discretion cannot be delegated, a principle which applies to public bodies as well as to private individuals.”

See also *Matter of Emigrant's Savings Institution*, 75 N. Y. 388; *Rose v. Low, Mayor*, 83 N. Y. Supp. 598, 85 A. D. 461.

§ 24. Where the expenditure involved does not exceed the sum of one thousand dollars, and in certain other cases excepted by the charter, where larger amounts are involved, in the case of emergencies, no formal contract is necessary, and competition may be dispensed with.

In New York the head of each department is required to make up annually an estimate of the amount of money which will be required to meet the expenses of his department. Upon this estimate an appropriation of money is made to each department by concurrent resolutions of the Board of Estimate and the Board of Aldermen, from which all current expenses of such department must be met. (§ 226, New York Charter.) And the head of each department is required to keep the expenses of his department within the appropriation made. In order that he may be advised of the balance available for this purpose, the comptroller must under § 149 of the charter advise each head of department monthly of the amount of the balance of cash available to meet the expenses of such department. Subject to this appropriation borough presidents and heads of department are permitted under § 419 of the charter to expend sums not exceeding one thousand dollars, without contract,

upon certifying the necessity for such expenditures, subject to such limitations as are placed upon the head of department by other statutes. Thus by § 618 of the charter the Park Board or each commissioner is permitted "in case of an emergency" to purchase articles required for immediate use, without calling for competitive bids, at an expense not exceeding one thousand dollars; by § 704 the Commissioner of Corrections may purchase perishable articles up to the sum of one thousand dollars, and in cases of emergency, articles required for immediate use up to the sum of two thousand dollars, without competition; by § 675 the Commissioner of Charities may likewise purchase up to the sum of three thousand dollars.

Therefore any contract for the expenditure of an amount in excess of the sum of one thousand dollars, not coming under a statutory exception, must be let upon competition, to the lowest bidder, as provided by § 419 of the charter. If not so made the contract is void. And this is true even though the expenditure be made in connection with another contract properly let, unless it be for "additional work" to be performed at a price not exceeding five per cent. of the cost of the original contract. Thus where a contract provided that if conditions developed requiring alterations to be made in the original contract which increased or decreased the cost, such changes were to be made by the contractor, and that the engineer was to be the sole judge of the same, and the amount to be paid thereon, it was held that the contract was illegal as in violation of § 419 of the charter requiring all contracts for amounts over one thousand dollars to be let to the lowest bidder.

But it appears upon reading § 419 of the charter in connection with § 149, that any contract made by a de-

partment without public letting for the performance of the work for a fixed sum is legally equivalent to an agreement to pay on *quantum meruit*. Section 149 of the charter requires the claim for such work to be audited by the department of finance. If the auditor thinks the work worth less than the contract price the plaintiff shall then establish his claim by competent evidence. The price named in such an agreement made without competition can be deemed to be only a maximum limitation and raises no presumption in favor of the contractor as to the value of his services. *F. V. Smith Contracting Co. v. City of New York*, 70 Misc. 132, 128 N. Y. Supp. 351.

Where, however, an expenditure of an amount of one thousand dollars or less is to be made, the certificate of the head of department as to the necessity of the expenditure is a pre-requisite, even though a custom to the contrary has grown up in the department permitting subordinates to make expenditures without such certificate. *Keane v. City of New York*, 88 A. D. 542, 85 N. Y. Supp. 130.

“No competitive bidding is required but the charter provides that no expenditure involving less than one thousand dollars shall be made unless the necessity therefor be certified to by the appropriate head of department and the expenditure be duly authorized and appropriated. This provision is not so substantial in the nature as that requiring that the contract be made only upon competitive bidding, and yet it is a limitation upon the authority of the city officials to contract. The provision requires as a condition precedent to making the contract that such official shall not only authorize the expenditure, but shall, before so doing, by a method *quasi judicial* in its nature, determine the necessity therefor and so

formally certify. The court cannot say that an order given by the commissioner by word of mouth is the equivalent of his formal and deliberative certification before the work is undertaken that the expenditure is necessary." *Dady v. City of New York*, 121 N. Y. Supp. 860, 65 Misc. 382.

But see *Moriarity v. City of New York*, 142 A. D. 717, 127 N. Y. Supp. 524.

The case of *Sheehan v. City of New York*, 75 N. Y. Supp. 802, should be noted. The action was to recover the value of material furnished to the Park Board in an emergency. The necessity thereof was not certified by a commissioner but by the superintendent of parks, and nevertheless the plaintiff was permitted to recover. The decision is clearly erroneous in the light of the other authorities herein cited.

But in the absence of fraud, the certificate of the head of department, when given, is binding upon the city. *Brady v. Mayor of New York*, 112 N. Y. 480; *Walton v. Mayor of New York*, 49 N. Y. Supp. 615, 26 A. D. 76.

Attention is directed to § 541 of the New York Charter as illustrative of a further exception to the general rule as provided in § 419, in so far as the commissioner is thereby authorized to select the bid, the acceptance of "which will in his judgment best secure the efficient performance of the work," although the contract is made subject to the approval of the Board of Estimate and Apportionment.

"When the contract is submitted to the board of estimate and apportionment, it is for them to examine it and to approve it or disapprove it as to its terms and conditions." *People ex rel. Merz v. Waring, Commissioner*, 39 N. Y. Supp. 193, 5 A. D. 311.

Likewise, see § 541 and § 536 of the New York

Charter permitting the commissioner of street cleaning, in case of snow fall, to hire "so many men, carts and horses as shall be rendered necessary by such emergency" for a period not exceeding three days.

Under § 821 of the New York Charter, the commissioner of docks is given broader powers than are usually granted to the head of a city department. It is therein provided that:

"Said commissioner of docks may, upon the forfeiture of any such contract, proceed to complete the work thereunder without contract or may readvertise for proposals to complete said work and award a new contract therefor in the same manner as provided herein for awarding the original contract; but no bidder under this section shall be entitled to a contract until his bid be approved and accepted by said commissioner of docks."

This section provides another exception to the general rule, in that it permits the commissioner to complete an abandoned contract, without limitation as to the expense involved.

Upon the authority of borough presidents, under § 383, New York City Charter, see also *Kelly v. Miller*, 139 N. Y. Supp. 991, 78 Misc. 584.

§ 25. Additional work.

It is provided in § 419 of the New York Charter that the head of department awarding a contract may include therein a provision to the effect that additional work may be ordered for the purpose of completing the contract, at a cost not to exceed five per centum of the amount of the contract price.

In *Dady v. City of New York*, 121 N. Y. Supp. 860, 65 Misc. 382, the court said:

"If the work performed is for the purpose of completing a contract already awarded and the expense thereof does not exceed five per centum of the amount of such contract, liability therefor may be created by

order of said commissioner; and I believe this may be so, even if the amount of such extra work exceeds the sum of one thousand dollars, provided it be for not more than five per centum of the amount of the original contract. It is therefore important to decide whether or not the work in question was done for the purpose of completing the contract. . . . The test in determining whether the liability of the city can be created by order of the commissioner is whether the work in question was additional work performed for the purpose of completing such contract."

See also *Matter of Morris & Cummings Dredging Co.*, 116 A. D. 257, 101 N. Y. Supp. 756; *Donlon Contracting Co. v. City of New York*, 119 N. Y. Supp. 617, 64 Misc. 471. But see § 85 of the New York City Ordinances limiting the authority of borough presidents to an expenditure of \$1,000.00 for extra work. In the event of a conflict resulting from such inconsistency, the provisions of the charter would prevail. *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808, 149 A. D. 98.

§ 26. Special legislation.

It has been noted that all authority possessed by municipal corporations is derived from legislative enactment. It naturally follows therefore that what authority the legislature may grant, it may by proper action revoke or modify. Likewise it may, by a special enactment, temporarily and for a special purpose, supersede the authority granted to municipal officers. This has commonly been done at times when large public improvements have been undertaken, and it has been deemed wise to create a special board of officers, who might give their undivided attention and study to the supervision of the work. And in these cases it

is often provided that such special board shall have broader powers and greater discretion than is ordinarily conferred upon municipal officers. Accordingly in the cases of contracts awarded or executed by such a special board, the rights of the parties thereto are to be determined by a study of the legislative enactment providing for the improvement in question.

Thus in the case of *Terrell v. Strong*, 35 N. Y. Supp. 1000, 14 Misc. 258, the aqueduct commissioners were given discretion to select the bid "which will in their judgment best secure the efficient performance of the work, or they may reject all bids." The contract was awarded to other than the lowest bidder and action was brought to restrain its execution. The commissioners had certified, as required by the statute, that the award of the contract would "best secure the public interest and the efficient performance of the work therein mentioned." The court decided:

"The law permits the commissioners to reject all bids which may be presented to them. It also permits them to accept whatever bid they think will produce the greatest efficiency in the performance of the work. That is the legislative policy upon which this particular work is being constructed. We have not power sitting as a court of equity to limit the range of the selection on the part of these commissioners. . . . The difficulty here, as I said before, is that the legislature has given a wide discretion to these commissioners. The usual policy of the law has been abandoned, namely that the work should be given to the lowest bidder. If the commissioners think that the giving of the work to one who is not the lowest bidder will insure efficiency they have power to give it to them."

"Undoubtedly the court will interfere to prevent fraud, injustice or the violation of a trust, and when-

ever it is shown that those in whom the discretion is vested are prepared illegally or corruptly to trample upon rights, or sacrifice interests intrusted to their care, then the courts will interfere to prevent the consummation of a fraud; . . . but the court will not, where it is merely a question of judgment, substitute its judgment for theirs.”

See also *People ex rel. Buffalo Paving Co. v. Mooney*, 38 N. Y. Supp. 495, 4 A. D. 557; *Greene v. Mayor of New York*, 60 N. Y. 303; *Schieffelin v. City of New York*, 122 N. Y. Supp. 502, 65 Misc. 609; *Wheeler v. City of New York*, 122 N. Y. Supp. 627; *In re Blodgett*, 91 N. Y. 117; *Union Paving Co. v. Board of Contract and Supply of Schenectady*, 74 Misc. 646, 134 N. Y. Supp. 740; *Kingsley v. City of Brooklyn*, 78 N. Y. 200.

In the last case cited the specifications provided for certain optional variations from the original plans during the course of the work, in the discretion of the engineer in charge. The changes were made and it was sought to defeat recovery on this ground. The court held:

“The power to make these changes is we think beyond question. The right was expressly reserved by the specifications in the contract. These were submitted to the common council and legislature and as the act of 1871 was passed with full knowledge and in view of the same and contains nothing which prohibits a change, we are unable to discover any violation of the provisions of this contract by the alterations made.”

§ 27. Judicial exceptions.

There remains to be considered those exceptions to the general rule regarding the formation of contracts

which may be classed as exceptions by judicial decisions. Most of the statutes similar to § 419 of the New York City Charter contain a provision such as the one therein found and referred to in subdivision A of § 22 of this chapter.

It has, however, been universally held by the courts, when the question has come up, that the municipal authorities have the right, irrespective of such statutory provision, to contract in certain excepted cases without competition. Such, for example, are the cases where skilled or professional services are required, as in the engaging of an architect, lawyer, stenographer, engineer or physician.

“That the services of a stenographer call for technical and professional knowledge and skill not of a character ordinarily to be obtained to the best advantage by competitive bids, cannot be seriously questioned. It has been so held as to architects and engineers, physicians and artists.” *O'Brien v. City of Niagara Falls*, 119 N. Y. Supp. 497, 65 Misc. 92.

“It was not necessary to let the contract for the preparation of the plans by competitive bidding. The services required scientific knowledge and skill, and that character of services need not be obtained by bid.” *Horgan & Slattery v. The City of New York*, 100 N. Y. Supp. 68, 114 A. D. 555.

See also *Bernstein v. City of New York*, 118 N. Y. Supp. 903, 134 A. D. 226; *Judson v. City of Niagara Falls*, 124 N. Y. Supp. 282, 140 A. D. 62.

Likewise the courts have held that § 419 of the New York Charter does not apply in certain cases where competition would be unavailing. But in all cases where such decisions were made there has been a strong incentive to strain the statute on grounds of public policy and because of strong equities favorable

to the claimants. But there are strong dissenting opinions in all of these cases, based upon the ground that since the statute provides a duly constituted authority which may waive the necessity of letting the work by contract, the same result as is accomplished by these decisions may be accomplished in a regular and orderly way without the establishment of such dangerous precedents as are made by these decisions. Furthermore, where, as in the case of *North River Electric Light Co. v. City of New York*, 62 N. Y. Supp. 726, 48 A. D. 14, public necessity demands that an exception be made to the statute, the legislature will not be loath to grant such an exception or to ratify a just claim contracted in ignorance of the correct interpretation of the statute and at the request of the municipal authorities acting in response to an urgent public demand. And this seems to be the correct view and logical conclusion resulting from the enactment of the statute. The legislature, in enacting § 419 of the charter, evidently realized that there might be occasions upon which it would be either necessary or desirable to dispense with the mandatory provision requiring that all indebtedness be incurred upon contracts let after competition, and it therefore provided that the Board of Aldermen might by a three-quarter vote waive this provision. Accordingly the rule which is stated in the cases to the effect that it is not necessary to contract upon competitive bids where competition "will avail nothing" does not appear to be a valid exception. The statute does not require competition where it will be useless, but it does require that competition shall be dispensed with in an orderly way, by resolution of the body authorized to make the exception, which in the case of the City of New York is the Board of Aldermen; and upon their failure to act resort should be had to the legislature.

However, the rule stating the exception as given in the case of *Gleason v. Dalton*, 51 N. Y. Supp. 337, 28 A. D. 555, and which has not been refuted by any higher authority, is here given. But it should be noted that since that decision § 530 and § 471 of the charter make it inapplicable even to the facts upon which it is decided. The court there held:

“The general rule which seems now to have been pretty firmly settled regarding the construction of this language (§ 419), is that where the subject-matter of the contract is such that competitive proposals work an incongruity, and are unavailing as affecting the final result, or where they do not produce any advantage, but the nature of the supply requires that it be determined from inspection and test, which are made up from present examination and trial and depend upon special knowledge and judgment, or where the thing to be obtained is a monopoly or the requirement is of personal skill or professional services, or it is practically impossible to obtain what is required and observe such form, the language of the statute does not apply, and the particular case falls within the exception.”

See *North River Electric Light Co. v. City of New York*, 62 N. Y. Supp. 726, 48 A. D. 14; *Matter of Dugro*, 50 N. Y. 513; and *Harlem Gas Light Co. v. City of New York*, 33 N. Y. 309. Both of the latter cases are often cited in support of this exception.

See also *Drew v. Village of White Plains*, 142 N. Y. Supp. 577, 157 A. D. 394.

§ 28. Contracts for patented articles.

NEW YORK CITY CHARTER.

Patented articles; how supplied.

§ 1554. “Except for repairs no patented pavement shall be laid and no patented article shall be advertised for, contracted for or purchased,

except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment."

This provision must be read in connection with § 419 of the charter. *Rose v. Low*, 85 A. D. 461, 83 N. Y. Supp. 598. Under the latter section it is to be noted that the form of the specifications are not generally subject to the approval of the Board of Estimate and Apportionment, but the head of department advertising for bids may prescribe such conditions to insure competition as he deems necessary. Under § 1554, however, the conditions to insure competition in the purchase of patented articles must be approved by the Board of Estimate and Apportionment.

As this section has been interpreted by the courts it was not the intention of the legislature to prohibit the municipal corporation from having the benefit of the patented articles, but to make necessary that those patentees who offer the benefit of their patents to the city should be compelled, by competing with others, to keep within reason the profits accruing from such patents, and to thus prevent a fraudulent mulcting of the municipal treasury. *Kay v. Monroe*, 87 N. Y. Supp. 831, 93 A. D. 484; approving *Rose v. Low*, 83 N. Y. Supp. 598, 85 A. D. 461.

This result, it is held, can be accomplished by preparing specifications which can be complied with by furnishing either the patented article or an unpatented article. But when the specifications so simulate the patented article as to prevent any one but the patentee from complying therewith, they are held to be illegal, and any contract awarded thereon is void.

The spirit of the statute must be complied with. A mere compliance in form and not in fact is insufficient. *Grace v. Forbes*, 64 Misc. 130, 118 N. Y. Supp. 1062.

Where this is impossible resort should be had to the power of the Board of Aldermen to resolve to take the case out of the general rule, as provided for in § 419 of the charter, or should the bidder offering the patented article fail to offer the lowest bid, upon a call founded on proper specifications, his bid may nevertheless be accepted by a three-quarter vote of the Board of Estimate and Apportionment.

The limitation upon the purchase of patented articles does not, however, apply to the hiring of a patented article. *Stockton v. City of Buffalo*, 108 A. D. 170, 95 N. Y. Supp. 509. There action was brought to void a lighting contract under which the city reserved the right to call upon the contractor to substitute and use Welsbach burners, said burners to remain the property of the contractor. Under a section of the charter substantially the same as that quoted above it was held:

“ It would appear that only the purchase of patented articles is prohibited, and that the use of such articles for a limited period would not fall within the operation of this section.”

Likewise, it is held, where the material used in a contract is not itself patented but only the machinery used in its making. In *Holly v. City of New York*, 128 A. D. 499, 112 N. Y. Supp. 797, it is said:

“ It is not possible to force the holder of a patent to assign his rights to others, so they may bid against each other. This is not what is meant by bidding on equal terms, for otherwise there could be no equal terms. All that is necessary is to afford each bidder an opportunity for fair competition.”

Nor is it possible to comply with the requirements of § 1554 of the charter by providing in the specifications that in accordance with an agreement between the city and the owner of a patented pavement, that the pat-

entee will furnish all necessary materials to any successful bidder at a fixed price. In *Rose v. Low, Mayor*, 85 A. D. 461, 83 N. Y. Supp. 598, where this question arose, the court interprets this statute as follows:

“ We think what was intended was, that there should thereafter be no patented pavement laid, and no purchase of a patented article, except under conditions which would allow competition. That competition could not be a competition to supply the patented pavement or articles, because the manufacturers thereof have a monopoly of them by reason of their patents. If, however, a certain result was to be arrived at, namely, a smooth pavement to be laid, then there could be advertisement for a smooth pavement which would comply with the requirements deemed proper by the local authorities having charge of the particular street to be paved, and the owner of the patented pavement could compete with others who furnished a pavement which complied with the same requirements; and in that way the patentees of a pavement could enter into competition with others who would lay the same character of pavement, and conditions could thus be created where there could be a fair and reasonable opportunity for competition.”

“ But when the conditions imposed by the board of estimate and apportionment are such that the only person who could lay the pavement is the patentee, it is apparent that the mandatory provisions of the statute have not been observed, and that the municipal authorities are prohibited from laying a pavement contracted for under such conditions.”

This principle is illustrated in the case of *Warren Bros. v. City of New York*, 190 N. Y. 297 (reversing 103 N. Y. Supp. 1145, 119 A. D. 856), where the Board of Estimate prepared a contract and specifications calling for bids as follows: The bidder was permitted

at his option to lay the pavement by one of three methods:

“ A. — Pavement of asphalt three inches in thickness, with a base of Portland cement three inches thick.”

“ B. — Pavement of sheet asphalt two inches in thickness, with a bituminous concrete binder one inch and a Portland cement concrete base three inches thick.”

“ C. — The Warren Patent Bithulitic pavement two inches in thickness, with a base of bituminous concrete four inches in thickness.”

It was held that this method of calling for bids “ is under all circumstances feasible, workable and affords a fair and reasonable opportunity for competition under section 1554.” “ If this result cannot be accomplished by the methods suggested it is apparently impossible to frame a form of specifications and contract that would carry out the letter and spirit of the section under construction. It appears from the description under the three methods named that, while each results in a pavement of equal thickness, the component parts differ in each case.”

See also *Union Paving Co. v. Board of Contract & Supply*, 74 Misc. 646, 134 N. Y. Supp. 740.

The cases of *Matter of Dugro*, 50 N. Y. 513, and *Harlem Gas Light Co. v. City*, 33 N. Y. 309, are often cited in connection with § 1554 of the New York Charter. At the time of these decisions there was no statute similar to § 1554. These decisions were made under a statute similar to § 419, New York Charter.

See also § 14, chapter 80, laws of 1913, adding § 25 to Highway Law, relating to the use of patented articles; *Warner-Quinlan Asphalt Co. v. Carlisle*, 144 N. Y. Supp. 70.

CHAPTER TWO.

PERFORMANCE IN GENERAL.

§ 29. Performance as condition precedent to payment.

Generally speaking, where one party agrees to perform certain acts for which the other agrees to pay, the performance by the first party in accordance with the contract is an implied condition precedent to payment. *Bonesteel v. City of New York*, 22 N. Y. 167.

Thus, where an architect was engaged to prepare plans for the erection of an armory to cost not more than \$500,000.00, and when bids were called for upon the plans prepared, the lowest bid offered to erect the building for \$600,000.00, the architect could not recover for his services. The court said:

“An architect employed to furnish plans and specifications for the erection of a building is entitled to remuneration therefor, if they are made in accordance with the directions of the owner. He cannot recover where the owner stipulates that the plans and specifications shall be for a building not to cost over a specified amount, if the plans and specifications are made for a building substantially exceeding that sum.” *Horgan & Slattery v. City of New York*, 100 N. Y. Supp. 68, 114 A. D. 555.

If a contractor breaks his contract and abandons the work, he is left without any cause of action whatsoever. His recovery depends upon the performance by him of his contract. Under such circumstances the owner has the right, independent of any special provision in the contract, to complete the work at the expense of the contractor. And the mere fact that the owner completes the contract, where he has an election either to

terminate it or complete it and charge the cost of completion against the contract price, is not evidence of an election on his part to complete the contract on behalf of the contractor. But if the owner desires to consider the contract as forfeited, it is necessary for him to make that fact known clearly, as otherwise it will be considered that he has completed the work under the contract and not on his own behalf after a forfeiture of the contract. *Dennison Const. Co. v. Mannes Schmidt*, 129 A. D. 600, 113 N. Y. Supp. 1071.

§ 30. Substantial performance.

The condition precedent which requires performance by the contractor before payment may be demanded of the owner, is a condition implied in law. The condition is implied by the courts ostensibly for the purpose of doing justice between the parties. It must, therefore, first be determined in each case whether or not justice requires its implication. In other words, the question to be decided is whether or not the breach complained of is of so serious a nature as to go to the essence of the contract and defeat recovery entirely.

There has thus grown up the doctrine of what is called "substantial performance of contracts," which is peculiarly applicable to building and construction contracts. Building contracts may embrace such a vast variety of details that it is manifestly impossible for the builder to comply literally with every particular of the agreement. Very great injustice might result if the owner were permitted to defeat entirely the recovery under the contract because of the failure of the builder to comply with the plans and specifications with perfect exactitude. Justice does not require the implication of any such condition precedent. It is accordingly held that the condition which is implied

is, that only substantial performance and not perfect performance of the contract is necessary. But the owner may charge the defects against the contractor and need pay him only the difference between the contract price and the cost of supplying the omissions or effacing the defects in the work.

“ It is well settled in this state that where a party has entered into a contract to perform work and furnish materials of a specified character, and the other party agrees to pay for the same upon the performance of the contract, although the work may be performed and materials furnished, yet, if not done in the manner stipulated, no action will lie for compensation. When performance is a condition of payment the former must be shown to entitle a party to recover unless it has been waived or released.” . . . “As was said in the above case, ‘ There is in a just view of the question no hardship in requiring builders to perform their contracts in order to entitle themselves to payment where the employer has agreed to pay only on that condition.’ As, however, this class of contracts embrace many particulars which it is difficult, if not impracticable, to comply with with entire exactness, the apparent rigor of the general rule has been so far relaxed as that a substantial compliance will be deemed sufficient.” *Glacius v. Black*, 50 N. Y. 148.

§ 31. Good faith essential.

In determining whether or not a contract has been substantially performed, it is necessary first to inquire as to the good faith of the contractor in his efforts to perform. If the defects are the result of a wilful failure on the contractor's part, he cannot claim to have substantially performed. It is only when he has made an honest effort to comply with the terms

of the contract, and has unintentionally and in spite of his best endeavors failed in some minor particulars, that he is permitted to recover.

Substantial performance was defined by the court in *Crouch v. Gutmann*, 134 N. Y. 45, as follows:

“ To constitute a substantial performance of such a contract, it must appear that the contractor, in good faith, intended to comply with the contract; that defects, if any, are not pervasive and do not constitute a deviation from the general plan, and are not so essential that they may not be remedied without difficulty.

“ Slight defects, caused by inadvertance or unintentional omissions, are not necessarily in the way of a recovery of the contract price, less the amount by way of damages requisite to indemnify the owner for the expense of conforming the work to that the contract calls for.”

And in *Anderson v. Petereit*, 33 N. Y. Supp. 741, 86 A. D. 600, the court said:

“ The relaxation of its strict application in cases arising under the building contracts was not intended to permit courts and juries to substitute a money indemnity as an equitable compensation for unfulfilled covenants of the contract, but arose because of the difficulty of complying with entire exactness with all the particulars embodied in that class of agreements. Hence it has been repeatedly said in the decisions that it is only in cases where there has been no wilful omission by the contractor, but he has *honestly* and *faithfully* performed the contract in all its substantial particulars, that he will not be held to have forfeited his remuneration by mere technical or unimportant omissions or defects.”

And in *Woodward v. Fuller*, 80 N. Y. 312:

“ It is now the rule that where a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by inadvertence or intentional omissions, he may recover the contract price less the damage on account of such defects.”

See also *Glacius v. Black*, 50 N. Y. 153; also 67 N. Y. 563; *Phillip v. Gallant*, 62 N. Y. 256; *Walden v. Eldred*, 11 N. Y. Supp. 856, 58 Hun 605; *Chapin v. Candee & Co.*, 35 N. Y. Supp. 1018, 14 Misc. 453; *Smith v. Sheltering Arms*, 35 N. Y. Supp. 62, 89 Hun 70; *Smyth v. Brooklyn Union El. R. R.*, 105 N. Y. Supp. 601, 121 A. D. 282; *Rowe v. Gerry*, 98 N. Y. Supp. 380, 112 A. D. 358; *City of Middletown v. Aetna Indemnity Co.*, 106 N. Y. Supp. 376, 121 A. D. 589; *Hamberger v. Rottenberg*, 30 N. Y. Supp. 240, 9 Misc. 477; *Hollister v. Mott*, 132 N. Y. 18; *Oberleis v. Bullinger*, 132 N. Y. 598; *Nolan v. Whitney*, 88 N. Y. 649; *Heckman v. Pinkney*, 81 N. Y. 212; *Spence v. Ham*, 163 N. Y. 220.

In the absence of any explanation, the presumption is that the omissions and defects in performance are wilful. *Smith v. Brady*, 17 N. Y. 173.

Only minor defects are excused.

The burden remains upon the plaintiff of showing performance of the contract, and contractors must understand that the obligation which the law imposes for the performance of building contracts is the same as with respect to other contracts. The rule of substantial performance will not be further extended. *Wollreich v. Fettretch*, 4 N. Y. Supp. 327; *Fuchs v. Saladino*, 118 N. Y. Supp. 172, 133 A. D. 710.

It is only where the deviations or omissions can be supplied for a comparatively small sum, *Spence v. Ham*, 163 N. Y. 220, and with no other difficulty or in-

convenience than is required in making ordinary repairs, *Woodward v. Fuller*, 80 N. Y. 312, that recovery will be permitted as for substantial performance. Where the work omitted by a contractor cannot be done except at great cost, and with great risk to the building, the contract has not been substantially performed. *Flannery v. Sahagian*, 31 N. Y. Supp. 360, 83 Hun 109.

The contractor cannot substitute his own ideas for those of the owner, but he must comply with his contract. *Smith v. Brady*, 17 N. Y. 173.

As the court said in the case of *Easthampton L. & C. Co. v. Worthington*, 186 N. Y. 407:

“It is not sufficient for the contractor to build a house, but he must build the house contracted for and substantially comply with the specifications as to the method of construction, materials and workmanship, before he is entitled to payment.”

And in *Schultze v. Goodstein*, 180 N. Y. at page 253:

“A building contract, like any other, is to be fairly performed according to its terms, and any substantial change, unless authorized by the owner or architect, is made at the risk of the contractor. In order to avoid injustice the law tolerates unsubstantial deviations made in good faith, but it exacts full compensation therefor, and permits a recovery on the theory of substantial performance only after the proper deductions have been made. The contractor had no right to substitute his own judgment for the stipulations of the contract, or to recover on the basis of complete performance, when, as the court found, he wilfully and intentionally used inferior and less expensive materials in the place of those agreed upon. When the owner stipulated for iron pipe he had the right to iron pipe, regardless of whether some other kind, according to the opinion of the contractor or of ex-

perts, would do as well. He agreed to pay upon the condition that iron pipe was used, and he is not obliged to pay unless that condition is performed.”

And the burden is upon the contractor to show that defects are of an immaterial nature, and also of showing what will be the cost of remedying such defects. *Spence v. Ham*, 163 N. Y. 220.

§ 32. Defects because of excess work.

The question of whether or not a contract has been substantially performed may arise by reason of the fact that the contractor has performed more work than is required by the contract. However, the principle involved is the same. Unless the excess is detrimental to the object for which the work was designed and renders it essentially a different thing, recovery will still be allowed as upon a substantial performance of the contract. It was so held in *Turner v. Haight*, 16 N. Y. 465, where the plaintiff contracted to build for the defendant masonry piers of certain dimensions and at a fixed price per yard. The plaintiff built the piers, but they were larger than the plans called for. It was not shown that because of their increased size they were less suitable for the purpose for which they were designed. The court said:

“It is clear that the only objection to the excessive size was the increased cost. Hence, if the defendants are not charged with the additional cost they have no reason to complain.” . . .

“It may as well be said that a plaintiff who hires for a month, and overworks his time a day or two, cannot recover for the month, as that this plaintiff cannot recover because he constructed these piers an inch or two thicker than the contract directed.”

§ 33. Performance by architects.

The doctrine of substantial performance has been applied in the case of an architect suing to recover compensation for the preparation of plans and the supervision of construction, in the case of *Hubert v. Aitken*, 5 N. Y. Supp. 839, 15 Daly 237; also 2 N. Y. Supp. 711, affirmed 123 N. Y. 655. There it was held, the fact that a chimney designed by the plaintiff proved inadequate for its purpose entitled the defendant to a reduction of the damages caused thereby from the amount due under the contract for drawing the plans and superintending the construction of the house. But such defect, it was held, could not be urged to defeat all recovery on the contract, the same being performed according to its terms. The theory of substantial performance seems here to have been carried to an extreme, but the case is interesting on the question of the duties of architects. The court said:

“When the architect has made frequent visits to the building and in a general way has performed the duties called for by the custom of his profession the mere fact, for instance, that inferior brick has been used in places, does not establish as a matter of law that he has not performed his contract.” . . . “An architect is no more a mere overseer or foreman or watchman than he is a guarantor of a flawless building, and the only question that can arise in a case where general performance of duty is shown, is whether, considering all the circumstances and peculiar facts involved, he has or has not been guilty of negligence. This is a question of fact and not of law.”

“He is an expert in carpentry, in cements, in mortar, in the strength of materials, in the art of constructing the walls, the floors, the staircases, the roofs, and is in duty bound to possess reasonable skill and

knowledge as to all these things; and when in the progress of civilization new conveniences are introduced into our homes, and become not curious novelties, but the customary means of securing the comfort of the unpretentious citizen, why should not the architect be expected to possess the technical learning respecting them that is exacted of him with respect to other and older branches of his professional studies? It is not asking too much of the man who assumes that he is competent to build a house at a cost of more than \$100,000.00 and to arrange that it shall be heated by steam, to insist that he shall know how to proportion his chimney to the boiler. It is not enough for him to say 'I asked the steam fitter' and then throw the consequence of any error that may be made upon the employer who engages him relying upon his skill."

See also *Straus v. Buchman*, 89 N. Y. Supp. 226, 96 A. D. 270; *Withers v. City of New York*, 123 A. D. 283, 107 N. Y. Supp. 955, 193 N. Y. 668; *Peterson v. Rawson*, 34 N. Y. 370; *Hunter v. Viccaro*, 146 A. D. 93, 130 N. Y. Supp. 625; *Bernstein v. City of New York*, 127 N. Y. Supp. 987, 143 A. D. 543. See § 89.

§ 34. Generally question of fact.

Whether or not a contract has been substantially performed is ordinarily a question of fact.

"The law is that if the contract was substantially performed, that was performance. The jury had to be so charged and it was for them to say whether there had been a substantial performance. The omission of some small things is not enough to defeat a recovery on a complaint for performance. *Ramstedt v. Brooker*, 98 N. Y. Supp. 1044, 113 A. D. 45.

"The question in each case will of course be an open

one, where defects exist, whether they are substantial or technical and unimportant. This is a question of fact." *Glacius v. Black*, 50 N. Y. 149.

See also *Johnson v. DePeyster*, 50 N. Y. 666; *Woodward v. Fuller*, 80 N. Y. 312; *Vanderzee v. Herman*, 59 Hun 117, 13 N. Y. Supp. 164; *Murphy v. Stickley-Simonds Co.*, 31 N. Y. Supp. 295, 82 Hun, 158; see Chamberlayne's Modern Law of Evidence.

§ 35. May be a question of law.

When the defects complained of pervade the entire work, the conclusion that the contract has been substantially performed may be precluded, and it may then become the duty of the court to rule as a matter of law that the contract has not been substantially performed. The court in the case of *Anderson v. Petereit*, 86 A. D. 600, 33 N. Y. Supp. 741, said:

" Ordinarily, the question of substantial performance has been held to be one of fact, but it was said in *Crouch v. Gutmann*, 134 N. Y. 45, 31 N. E. 271, that the cost of the completion of work by remedying defects or supplying omissions in it to meet the requirements of a contract may be so great as to preclude the conclusion of substantial performance."

And in *Smyth v. Brooklyn Union Elevated R. Co.*, 105 N. Y. Supp. 601, 121 A. D. 282, the court stated:

" There are cases where the omissions or defects are so large as to require a conclusion as matter of law that the contract was not substantially performed, or the same conclusion may be required by their being wilful and intentional; but this is not such a case."

Also in *Rochkind v. Jacobson*, 110 N. Y. Supp. 583, 126 A. D. 357, where omissions to an extent exceeding 10% of the contract price were shown, it was held that such a failure precluded a finding of substantial performance, and that it was the duty of the court

to rule as a matter of law that the contract had not been substantially performed.

See also *Fuchs v. Saladino*, 118 N. Y. Supp. 176, 133 A. D. 710; *Excelsior Terra Cotta Co. v. Hardee*, 85 N. Y. Supp. 732, 90 A. D. 4; *Mitchell v. Williams*, 80 N. Y. Supp. 864, 80 A. D. 527; *Volk v. McKeize*, 16 N. Y. Supp. 741; *D'Amato v. Gentile*, 66 N. Y. Supp. 833, 54 A. D. 625; *Smith v. Ruggiero*, 65 N. Y. Supp. 89, 52 A. D. 382.

§ 36. Waiver of complete performance.

The question has frequently been raised as to whether or not the complete performance of the contract has been waived because the owner has taken possession of the property. The law is, however, very clear, that mere use and occupation by the owner does not amount to a waiver of any provision contained in the contract. This case must be distinguished from those in which by mere acceptance of personal property a new obligation is created to pay for the article accepted. In the latter cases a reasonable opportunity for inspection is allowed, but if, after the defective character of the article becomes known by inspection or trial, the purchaser retains the same, such retention will constitute an election to accept. *Chambers v. Lancaster*, 38 N. Y. Supp. 253, 3 A. D. 215; *Brown v. Foster*, 108 N. Y. 387; *Cassidy v. Horton*, 65 N. Y. Supp. 626, 32 Misc. 148. But where a party must, by reason of the nature of the contract, receive its benefits in advance of complete performance, and he is not under obligation to pay until performance is complete, he may retain without compensation the benefits of a partial performance. This is the situation in building contracts.

“ The owner from the nature of the case takes the benefits of part performance, and therefore, by merely

so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by any other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance." *Smith v. Brady*, 17 N. Y. 173.

See also *Walden v. Eldred*, 11 N. Y. Supp. 856; *Fuchs v. Saladino*, 118 N. Y. Supp. 172, 133 A. D. 710; *Vanderzee v. Herman*, 13 N. Y. Supp. 164, 59 Hun 117.

§ 37. Waiver is a question of intent.

"And the law does not adjudge that a mere silent occupation of the building by the owner amounts to a waiver, nor does it deny to him the right to so occupy and still insist upon the contract. The question of waiver of the condition precedent will always be held to be one of intention arrived at from all the circumstances, including the occupancy." *Smith v. Brady*, 17 N. Y. 173.

See also *Anderson v. Petereit*, 33 N. Y. Supp. 741, 86 A. D. 600; *Flaherty v. Miner*, 123 N. Y. 382.

To constitute a waiver the owner must accept with knowledge of the defects. In *Cahill v. Heuser*, 37 N. Y. Supp. 736, 2 A. D. 292, the plaintiff admitted that the contract had not been substantially performed, but claimed that the defendant had waived exact performance by making payments on account. The court said:

"M. never accepted the work or promised to pay therefor with knowledge of the facts. The burden was upon the plaintiff (the contractor) of showing performance or an actual waiver with full knowledge of the facts (*Bank v. Mitchell*, 73 N. Y. 414), and he failed to establish either."

Where the intent to accept is clearly expressed, and where the defects objected to are specified by letter or otherwise, all other defects are waived.

In *Smith v. Russell*, 129 N. Y. Supp. 461, 144 A. D. 847, the plaintiff contracted to erect a building and after its completion the defendants wrote to the contractor saying that his money was ready for him, "as soon as the building was completed according to the contract; the ventilators must be put in." The court held that the letter amounted to a waiver of any defect other than the absence of the ventilators.

The question of whether there has been a waiver is one of fact. *Parke v. Franco American T. Co.*, 120 N. Y. 51.

§ 38. Impossibility of performance.

An agreement to do a thing which is impossible of performance is unenforceable. If, however, the agreement is possible of performance, even though it be impossible for the individual promisor to perform, it will be enforced.

"Difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance." *Cameron-Hawn Realty Co. v. City of Albany*, 207 N. Y. 377.

See also *Marsh v. Johnston*, 109 N. Y. Supp. 1109, 125 A. D. 597.

Where performance of a contract is impossible, both parties are excused and neither can recover against the other. *Asphalt Paving & Contracting Co. v. City of New York*, 127 N. Y. Supp. 794, 69 Misc. 588.

Attention is directed to the distinction drawn in the latter case between the cases of *Cameron-Hawn Realty*

Co. v. City of Albany, 134 A. D. 722, 119 N. Y. Supp. 128 (reversed 207 N. Y. 377), and *McKnight Flintic Stone Co. v. Mayor of New York*, 160 N. Y. 72.

§ 39. Unforeseen contingencies do not excuse performance.

Where a contract is to do a thing which is in itself possible, it must be performed or there can be no recovery. Subject to the qualifications to be noted, the law is well established that where a party by his own contract imposes an obligation upon himself, impossibility of performance is no excuse, provided the contingency which prevents performance is such as might have been foreseen and guarded against.

It is important therefore for contractors to provide in their contracts against such accidents or occurrences as may unexpectedly arise and cause delay or make performance of the contract impossible, such as strikes, boycotts, inclement weather or other unforeseen difficulties. Otherwise the contractor will be held strictly accountable for his failure to perform in accordance with the terms of his contract.

But even if such a provision is incorporated in the contract, it is the duty of the contractor to make every reasonable effort to perform the contract according to its terms. When a contract provides for the completion of a building by a specified date, "contingent upon strikes and boycotts," it protects the contractor from liability for damages because of unavoidable delay so far as the damage is due to that cause. And the strikes referred to are not limited to such as occur in the shops of the contractor. But the contractor is not at liberty to order material from a striking factory and then rely upon the clause in the contract for protection. As the court said in *Milliken v. Keppler*, 38 N. Y. Supp. 738, 4 A. D. 42:

“ A duty rested upon it to perform the contract if possible and to exercise care, diligence and skill to this end. All that was obtained was immunity from the general rule of the law, which refuses to accept inevitable and unforeseen accidents as an excuse for the non-performance of an absolute agreement.”

See also *Miller v. Norcross*, 87 N. Y. Supp. 56, 92 A. D. 352; *D. L. & W. R. R. v. Bowns*, 58 N. Y. 573.

In the case of *Norton v. Fancher*, 36 N. Y. Supp. 1033, 92 Hun 463, the court held:

“ It is conceded by both parties that the contract which constitutes the subject-matter in this action was entire in its character. By its terms the plaintiff was to perform certain work and accomplish certain results at a stipulated price. While the work was progressing an unavoidable accident occurred, and a considerable portion of the earth filling was washed away, without the fault of anyone, in consequence of which it had to be replaced by the plaintiff. This, undoubtedly, proved a serious matter for the plaintiff, and put him to trouble and expense not contemplated by either himself or the defendant at the time of entering into the contract; but for this very reason which probably accounts for the contract being silent upon the subject, the law requires that he shall be the sole sufferer. *Harmony v. Bingham*, 12 N. Y. 99; *Tompkins v. Dudley*, 25 N. Y. 272; *Williams v. Vanderbilt*, 28 N. Y. 217; *Dexter v. Norton*, 47 N. Y. 62; *Booth v. Mill Co.*, 60 N. Y. 487.”

The court held likewise in *Mairs v. Mayor of New York*, 65 N. Y. Supp. 160, 52 A. D. 343 (reversing 62 N. Y. Supp. 351, 30 Misc. 384). There the plaintiff contracted with a city to build a crib fender for a draw bridge, on the bottom of a bay. In advertising for bids the city notified all bidders that though soundings and estimates had been made, bidders must

satisfy themselves of their accuracy. The contract provided that all loss arising from the nature of the work or from unforeseen obstructions should be sustained by the contractor. After proceeding with the work for some time, the contractor discovered that there was a water pipe on the bottom of the bay, where the crib fender was to rest, and of which no map or specification was recorded. It was held that the obstruction encountered was within the terms of the contract, and the city was not liable for extra cost caused the contractor by reason thereof.

See also *Asphalt Paving Co. v. City of New York*, 127 N. Y. Supp. 794, 69 Misc. 588; *Barnum v. Williams*, 102 N. Y. Supp. 874, 115 A. D. 694; *Deeves v. Mayor of New York*, 17 N. Y. Supp. 460, 60 Super. 339.

But see *Horgan v. Mayor of New York*, 160 N. Y. 516, and §§ 77-79.

§ 40. Prevention of performance by third party, excuses.

Where the impossibility of performance arises from the acts of the other party, the promisor will of course be relieved from further performance, and will be allowed to recover for the services rendered up to the time of the breach. See *Cargain v. Everett*, 16 N. Y. Supp. 669, where the plaintiff agreed to paint the defendant's house for \$100.00, materials to be supplied by the defendant, and the defendant failed to supply sufficient material.

In the case of *Dolan v. Rodgers*, 149 N. Y. 490, the defendant's contract contained a provision prohibiting the sub-contracting of any part of the work without consent. In violation of such clause the defendant sublet part of the work to the plaintiff, who had partly performed when the owner objected and prevented further performance. On action, the plaintiff was

allowed to recover for his services rendered up to the time that further performance was prevented. Beyond that time both parties were relieved from the obligations of the contract. The court said:

“Impossibility of performance is, in general, no answer to an action for damages for non-performance of a contract, provided the contingency was such as the promissor should have foreseen and provided against when he made the promise, nor will it permit a recovery for part performance of an entire contract. If, however, the impossibility arises even indirectly from the acts of the promisee, as, for instance, where one of the contracting parties so conducts himself as to subject the other to an action by some third person, if he duly performs the contract, it is a sufficient excuse for non-performance (*Gallagher v. Nichols*, 60 N. Y. 438). This is upon the principle that he who prevents a thing from being done may not avail himself of the non-performance, which he has himself occasioned, for the law says to him, in effect: ‘This is your own act, and therefore you are not damnified.’ . . . But we prefer to base our affirmance of the judgment upon another ground. We think that as both parties had in view the contingency that performance might not be permitted by the railroad company, it was an implied part of their contract that if such were the result, both were to be released as to the future, but bound as to the past.”

“The effect of the rule is to excuse both parties from further performance of the contract without giving to either the right to recover damages for the part not performed. In England the rule seems to go on farther in its effect than to relieve both parties from any obligation under an entire contract, with reference either to the future or the past. In this country, however, there may be a pro-rata recovery

for part performance by the one party, at least where what has been done is of benefit to the other."

Prevention of performance by operation of law excuses performance.

See § 56 under "Delays Caused by Operation of Law."

§ 41. Prevention of performance by destruction of essential property.

It is a well recognized exception to the general rule, that where the performance becomes impossible because of the destruction of some specific essential thing, further performance by either party is excused.

In *Hayes v. Gross*, 40 N. Y. Supp. 1098, 9 A. D. 13, affirmed 162 N. Y. 619, the plaintiff agreed to furnish the necessary material and to do certain carpenter work in connection with the erection of a hotel owned by the defendant. The plaintiff had performed a large part of his work and had been paid several installments of the contract price when the building was destroyed by fire without the fault of either party. The court decided that the plaintiff was excused from further performance because it became impossible without fault of his own. He was entitled to recover for all the labor and material which he added to the house, because his further performance was impossible and therefore non-performance could not be imposed as an obstacle to his recovery, and also because what he thus added became the defendant's property, and thus the fire destroyed the defendant's and not the plaintiff's property.

"The non-continuance of the subject-matter excuses him from further performance; but we see no reason why his employer should not bear his own

loss, and pay for the property which he acquired. When part performance has been made, and there is a legal excuse for further performance, then there is no legal defense to the demand for payment for part performance."

But this kind of case must not be confused with that in which the contractor agrees to supply the necessary material and to erect and deliver to the owner a completed building for a fixed price. In the one case the contractor is doing work upon an existing building, and adding material thereto or is doing work in connection with the erection of a building. If the building is destroyed it is impossible for the contractor to continue and complete the performance of his contract. In the second case, the contractor obligates himself to build and deliver a completed building. His contract is not performed until he does so. If one house burns down before it is completed or accepted he can build another.

Such a case was *Tompkins v. Dudley*, 25 N. Y. 272. There one Chambers agreed to erect a school house according to certain specifications. The defendants guaranteed the performance of the contract. The building when almost finished but before the acceptance or delivery of the key, was destroyed by fire. Action was brought to recover the moneys paid on account of the contract price and also for damages for breach of the contract. The court allowed recovery and said:

"It is not the providence of the law to relieve persons from the improvidence of their own acts." . . .
"When one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather, the law leaves it where the agreement of the parties has put it; the law will not insert for the benefit of one of the parties, by construction,

an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do."

The distinction between the cases is pointed out in *Hayes v. Gross*, 40 N. Y. Supp. 1098, 9 A. D. 13, as follows:

"When a builder agrees to erect and complete an entire house, if the house is destroyed by fire before completion, the builder can erect another; and, if he does not do so, he is guilty of a breach of contract. But if a painter agrees to paint a certain house, and the house is destroyed before the painting is finished, it is impossible for him to complete his contract. If a new house should be erected, it would not be the house he had agreed to paint."

"Why should not the painter be paid for his part performance? It was not his fault that full performance was impossible. But why should the owner pay? Because every stroke of the painter's brush converted something of the painter's labor and material into the property of the owner, and thus the fire destroyed the owner's property and not the painter's."

See also *Clark v. Koeppe*, 104 N. Y. Supp. 65, 119 A. D. 458, as to necessity of showing owner's negligence. *Harmony v. Bingham*, 12 N. Y. 99; *Buffalo Land Co. v. Bellevue Land Co.*, 165 N. Y. 254; *Wheeler v. Conn. Life Ins. Co.*, 82 N. Y. 545.

§ 42. Where essential conditions do not exist.

In connection with the exceptions to the general rule set forth as to the obligation of performance of impossible contracts, the case of *Kinser v. The State*, 125

N. Y. Supp. 46, 69 Misc. 78, should be noted (affirmed in the Appellate Division in 145 A. D. 21, 129 N. Y. Supp. 567, and affirmed by the Court of Appeals in 204 N. Y. 381).

The opinion in the Court of Claims states:

“ From these cases it will be seen that a fourth exception must be made to the general rule that accident or an unforeseen contingency arising without the fault of either party will not excuse performance of an absolute executory contract, and the four exceptions may now be stated broadly as follows: First, where the legal impossibility arises from a change in the law (*Jones v. Judd*, 4 N. Y. 411; *Heine v. Meyer*, 61 N. Y. 171; *Labaree Co. v. Crossman*, 100 A. D. 499, 92 N. Y. Supp. 565; *People v. Bartlett*, 3 Hill, 570; *Hildreth v. Buell*, 18 Barb. 107). Second, where the specific thing which is essential to the performance of the contract is destroyed (*Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174; *Lorillard v. Clyde*, 142 N. Y. 456, 37 N. E. 489, 24 L. R. A. 113; *Hayes v. Gross*, 9 A. D. 12, 40 N. Y. Supp. 1098). Third, where by sickness or death personal services become impossible (*Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Gaynor v. Jones*, 104 A. D. 35, 93 N. Y. Supp. 287; *Matter of Daly*, 58 A. D. 49, 68 N. Y. Supp. 596), and fourth, where conditions essential to performance do not exist (*Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; *Dolan v. Rodgers*, 149 N. Y. 489, 44 N. E. 167; *Buffalo & Lancaster Land Co. v. Bellevue L. & I. Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; *Whippel v. Lyons Beet Sugar Refining Co.*, 64 Misc. Rep. 363, 118 N. Y. Supp. 338). From these conditions the rule may be deduced fairly in the present

case that where in the course of the construction of a canal natural conditions of soil unexpectedly appear which contingency the contract does not in express terms cover, and which render the performance of the contract as planned impossible, and make necessary substantial changes in the nature and cost of the contract and substantially affect the work remaining under the contract, the law will read into the contract an implied condition when it was made that such a contingency will terminate the entire contract.

“ These terms are implied in the contract by force of the law itself, and not because the parties had them in mind.”

“ In the eyes of the law being a part of the terms of the contract, the conditions that rendered performance impossible do not terminate the contract *ab initio*, and vitiate what has been done and what remains to be done that is capable of execution. The conditions may be of such an extent as to amount to a substantial abrogation of the entire contract, or they may relate to an insignificant part of the contract, but they excuse performance only to the extent to which performance is impossible, and leave what has been done valid permitting a recovery therefor, and may not excuse performance of the remaining work. No general rule can be laid down which will apply to all cases, but each case must be decided upon its own facts, and that this course can be taken and justice done according to the facts in each case unhampered by written rules is due to the great flexibility of the common law which is its chief merit.”

§ 43. Performance to “satisfaction” of other party.

Where payment is made to depend upon the performance of the work to the satisfaction of the owner or his representative, the term “satisfaction” will

be held to mean a "reasonable satisfaction." It is only in cases involving aesthetic taste or personal preference that an arbitrary decision of dissatisfaction may be successfully pleaded.

In *Gearty v. Mayor of New York*, 171 N. Y. 61 at p. 71, the court says:

"The fact that this work was to be performed to the satisfaction of the commissioners and their engineer of construction is not conclusive against the plaintiff. That power cannot be exercised in an arbitrary manner but reasonably and in accordance with fairness and good faith."

"This court has frequently held that under such a provision, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with. *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; *Russell v. Allerton*, 108 N. Y. 288; *Doll v. Noble*, 116 N. Y. 230; *City of Brooklyn v. Brooklyn City R. R. Co.*, 47 N. Y. 475."

And in *Pollock v. Pennsylvania Iron Works*, 34 N. Y. Supp. 129, 13 Misc. 194, the court said:

"This court has held that the satisfaction is legal satisfaction, and that an architect cannot capriciously and wilfully refuse to be satisfied, and that if the work has been performed substantially in accordance with the contract the architect ought to be satisfied and the law will hold he is satisfied. *Hopper v. Cutting*, 13 N. Y. Supp. 820; *Byron v. Bell*, 10 N. Y. Supp. 693; *Highton v. Desau*, 19 N. Y. Supp. 395; *McCarthy v. Gallagher*, 23 N. Y. Supp. 884."

See also *Brown v. Retsoff Mining Co.*, 111 N. Y. Supp. 594, 127 A. D. 368; see Chamberlayne's Modern Law of Evidence.

§ 44. Entire and divisible contracts.

In determining the question of performance of a contract and the right to payment therefor, it may be

necessary to decide the question as to whether or not the contract is entire, necessitating a full performance as a condition precedent to payment, or divisible, permitting of a partial recovery for part performance. Whether the several parts of a contract made at one and the same time are to be taken distributively and are independent, or whether entire performance by one party of all stipulations on his part is a condition precedent to his right of recovery against the other party in respect to a portion of the contract which he has fully performed, is a question of intention and generally of fact. *Tipton v. Feitner*, 20 N. Y. 423; *Ming v. Corbin*, 142 N. Y. 340; *Equitable Trading Co. v. Stoneman*, 131 A. D. 376, 115 N. Y. Supp. 285; *White v. Livingston*, 69 A. D. 361, 75 N. Y. Supp. 466, 174 N. Y. 538; *Clark v. West*, 137 A. D. 23, 122 N. Y. Supp. 380.

Thus in *Uvalde Asphalt Paving Co. v. City of New York*, 112 N. Y. Supp. 535, 128 A. D. 210, affirmed 198 N. Y. 548, the plans and specifications and the advertisement for bids for the construction of a municipal sewer and sewage disposal plant in connection therewith, contained the word "contracts," and in separate specifications required separate bids on each job. It was held that an intention that the contract for each should be let to the lowest bidder was indicated, the contract was severable, and that the contractor might recover against the municipality for the construction of the sewer, although the proceedings authorizing the disposal plant were illegal and void. To the same effect, see *Hart v. City of New York*, 201 N. Y. 45.

In *Toher v. Schaeffer*, 91 N. Y. Supp. 3, 45 Misc. 618, the plaintiff agreed to do "all necessary excavating as per plans and specifications" and the contract fixed a price for both rock and earth work. The

plaintiff admitted that only 135 yards of rock out of a possible 1,144 yards had been excavated, and contended that the contract was divisible and that a failure to perform the rock excavation did not prevent recovery for the earth work. The court said:

“ Whether or not a contract is divisible is a matter which rests upon the intentions of the contracting parties as ascertainable from the contract itself, and the contract under review pledged no ground for saying that the plaintiff expected to be paid or that the defendant expected to make payment until the entire work contracted for had been performed.”

See *Johnson v. Dahlgren*, 166 N. Y. 354; *Rosen v. Bonagur*, 143 N. Y. Supp. 1059; *First Nat'l Bank v. Mitchell*, 93 N. Y. Supp. 231, 46 Misc. 30; *Cronin v. Tebo*, 24 N. Y. Supp. 644, 71 Hun 59, affirmed 144 N. Y. 660.

See also “ Extent of Lien,” § 171.

§ 45. Abandonment and rescission.

A refusal by a party to perform his contract amounts to an abandonment of it. *White v. Graves*, 87 N. Y. 464; *Rosen v. Bonagur*, 143 N. Y. Supp. 1059. But the intention to abandon must be made clear. Thus a mere statement by a contractor that, unless he is paid his claim for extra work, he will not proceed with the contract, is not such an abandonment as will justify the termination of the contract upon the instant of the disallowance of the claim when the contractor is still prosecuting the work. *Sewer Commissioners v. Sullivan*, 42 N. Y. Supp. 358, 11 A. D. 472, affirmed 162 N. Y. 594; *National Contracting Co. v. Hudson River W. P. Co.*, 192 N. Y. 218; *Sullivan v. N. Y. & R. C. Co.*, 119 N. Y. 348.

Where the contract is abandoned by one party, the other may acquiesce and thus effect a dissolution of it,

or he may elect to stand upon the contract and sue for breach, or in a proper case for specific performance. *White v. Graves*, 87 N. Y. 464.

The burden of showing justification for the abandonment of the contract is upon the party abandoning. *Wollreich v. Fettretch*, 4 N. Y. Supp. 326. A contractor cannot, by merely abandoning a contract, relieve himself of its obligations and bring his action upon a *quantum meruit*. *Finger v. Korn*, 123 N. Y. Supp. 239.

Contractors will not be justified in abandoning a contract after the date fixed for completing the work, on account of disputes respecting the kind of work being done, or the kind of materials being used, or because the owner refuses to release the contractor from liability for liquidated damages. *Hutton Bros. v. Gordon*, 23 N. Y. Supp. 770, 2 Misc. 267.

But a contractor who, having nearly finished his work, is reproached for being a swindler, knocked down by the owner and ordered never to come into the building again, may enforce a lien for work already done without completing the contract, although notified to do so by the owner. His abandonment under the circumstances is justified. *Sproessig v. Kental*, 17 N. Y. Supp. 839.

Bankruptcy and assignments.

An assignment for the benefit of creditors or the bankruptcy of the contractor does not operate as a rescission of the contract, nor justify the other party in treating the contract as abrogated. It is not necessary that a general assignee should give notice of his intention to stand by the contract. *New England Iron Co. v. Gilbert El. Ry. Co.*, 91 N. Y. 153; *Pardee v. Kanedy*, 100 N. Y. 121; *Phoenix Nat'l Bank v. Waterbury*, 197 N. Y. 161; *Vandegrift v. Cowles Eng. Co.*, 161 N. Y. 444.

Where a contract is entire and there is no provision for payment until completion, if the contractor abandons his contract and fails to perform it, he is not entitled to compensation for the work done. *Cronin v. Tebo*, 24 N. Y. Supp. 644, 71 Hun 59, affirmed 144 N. Y. 660; *Williams v. Daiker*, 68 N. Y. Supp. 348, 33 Misc. 70.

Modification and rescission.

Persons competent to make a contract are competent to waive or abandon it, and where both concur in such waiver or abandonment, their united action dissolves the contract, and the rights of each under it are ended. *Graves v. White*, 87 N. Y. 464.

Where a contract is thus rescinded while in the course of performance, no claim in respect of performance or of what has been paid or received thereon may thereafter be made unless expressly or impliedly reserved upon the rescission. *McCreery v. Day*, 119 N. Y. 1; *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289; *Mayor of New York v. N. Y. R. C. Co.*, 146 N. Y. 210; *Jenks v. Brown*, 66 N. Y. 629.

A contract under seal may be annulled or modified by a substituted parol agreement if followed by actual performance.

“It is the rule in this state that a written contract under seal cannot be modified by a subsequent executory parol agreement. So far as such agreement has been executed it is binding, and money paid thereunder may not be recovered. But so far as it is still executory it may be repudiated and the terms of the original contract enforced.” *Mitchell v. Dunmore Realty Co.*, 141 N. Y. Supp. 93, 156 A. D. 117.

See also *Interrante v. Levinson*, 129 A. D. 495, 113 N. Y. Supp. 1082; “Ejectment of Contractor for Delay,” § 58; “Right to Alter Specifications,” § 84. As to rescission because of mistake in bidding, see § 4.

CHAPTER THREE.

SECURITY FOR PERFORMANCE.

§ 46. Security on bids and for performance.

§ 420 of the New York Charter (§ 2 of text) requires that security for performance of the contract either in the form of cash or certified check shall be deposited with the bid.

“ The purpose of the check delivered with the bid is to indemnify the city against the reletting of the contract and against the damages it might sustain by being compelled, through the default of a bidder, to execute his contract, to relet the work at an increased price.” *Erving v. Mayor of New York*, 131 N. Y. 133.

The deposit will be deemed liquidated damages for a breach of the bidder; and in an action by the bidder to recover the amount of his deposit, the city need not prove actual damages. *Davin v. City of Syracuse*, 126 N. Y. Supp. 1002, 69 Misc. 285; *Harper v. City of Newburgh*, 139 N. Y. Supp. 1057, 79 Misc. 299; *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808, 149 A. D. 98.

See “ Liquidated Damages,” § 120.

Section 419, New York Charter (§ 2 of text) requires that the successful bidder shall give security to be approved by the comptroller for the faithful performance of the contract, as required by § 520, New York City Ordinances. The amount of the bond is fixed by the officer who is to receive the bid, subject to the approval of the comptroller. *Selph v. City of Brooklyn*, 39 N. Y. Supp. 521, 5 A. D. 529. The amount of security to be thus required must be stated in the proposals. *Smith v. City of New York*, 10 N. Y. 504.

Under § 1557, New York Charter, a guaranty company may act as surety. See Pingrey on Suretyship & Guaranty, chapter XVI.

There is no compulsion on city officials to accept a surety if unsatisfactory, or to permit a substitution of sureties. *Adams v. Ives*, 63 N. Y. 650.

§ 47. Indemnity against claims for damages.

It is customary and sometimes mandatory to incorporate in municipal contracts a provision requiring the contractor to indemnify the city for any damages or costs to which the city may be put by reason of injury to person or property of another resulting from negligence or carelessness in the performance of the work (§ 519, Ordinances, City of New York), and that the whole or so much of the moneys due to the contractor under and by virtue of his agreement as shall or may be considered necessary by the commissioner shall and may be retained by the city until all such claims for damages shall have been settled and evidence to that effect furnished to the satisfaction of the commissioner. *Lord Electric Co. v. City of New York*, 145 N. Y. Supp. 205, 160 A. D. 344.

The provisions of the latter clause are solely for the benefit of the city and not for the sureties. The city may waive it, without releasing the sureties. *Mansfield v. Mayor*, 165 N. Y. 208; *Mayor v. Brady*, 151 N. Y. 611.

And the fact that the city officials do not retain a sufficient amount under such a clause to indemnify the city or that having retained a sufficient amount they release it upon the giving of a second bond for a lesser amount which later proves to be insufficient to meet the judgment obtained, does not release the sureties on the original contract. The city may recover

against the sureties upon whose bond the money was paid and then hold the original sureties for any balance due, because the city is not bound to retain anything. It has the option.

The sureties have no right to insist that the city should exercise such an option. *City of New York v. Baird*, 117 N. Y. Supp. 561, 132 A. D. 770; *City of New York v. Baird*, 176 N. Y. 269; *City of New York v. Baird*, 102 N. Y. Supp. 915, 117 A. D. 659, affirmed without opinion 191 N. Y. 501.

And apparently the sureties have no right to insist that an action pending to recover damages resulting from a contractor's negligence should be prosecuted on appeal to the highest court, if the city officials deem it wise, in good faith, to settle the action. *City of New York v. Baird*, 102 N. Y. Supp. 915, 117 A. D. 659.

And in such cases where one stands in the position of an indemnitor to another, who is immediately liable to a third party, the indemnitor's liability to his indemnitee may be fixed and determined in an action brought against his indemnitee by a third party, if notice of the pendency of such action be given to the indemnitor, and the opportunity afforded him to defend it.

“ The principle is well settled that by notice and an opportunity to defend an action, the party notified becomes a party thereto so as to be concluded in any subsequent litigation between the same parties, as to all questions determined in the action which are material to the right of recovery in the second action, and the judgment in the first action is conclusive upon the defendant in the first action, in the character of plaintiff in the second action, as to the facts thereby determined; therefore, if it appears that the judgment in the *Horning* (first) action was based upon a finding of fact fatal to the recovery in this (second) action, it

cannot be maintained.” *Fulton County G. & E. Co. v. Hudson River Tel. Co.*, 200 N. Y. 287.

See also *Mayor v. Brady*, 151 N. Y. 611; *Mason-Henry Press Co. v. Ætna Ins. Co.*, 146 A. D. 181, 130 N. Y. Supp. 961; *Tolmie v. Fidelity & Casualty Co.*, 88 N. Y. Supp. 717, 95 A. D. 352, affirmed 183 N. Y. 581; *City of New York v. Baird*, 102 N. Y. Supp. 915, 117 A. D. 659, affirmed 191 N. Y. 501; *Mayor of New York v. Mechanics' & Traders' Bank*, 139 N. Y. Supp. 92, 154 A. D. 523.

And since a judgment in the first action is conclusive only as to such issues as have been adjudicated, it follows that mere proof of the recovery of such a judgment by a third party against an indemnitee is not conclusive proof of the indemnitor's liability to the indemnitee, since such judgment may have been founded upon findings repugnant to the indemnitor's liability as set forth in the contract of indemnity, *Mason-Henry Press Co. v. Ætna Ins. Co.*, 146 A. D. 181, 130 N. Y. Supp. 961, or upon findings sufficient to support it against the indemnitee, but insufficient as against the indemnitor, because further proof upon issues not thereby decided may be required by the contract of indemnity. Such a case would be one where the contract of indemnity provided for a shorter limitation within which the action might be brought than was provided for by statute. *Tolmie v. Fidelity & Casualty Co.*, 88 N. Y. Supp. 717, 95 A. D. 352, affirmed 183 N. Y. 581; *Creem v. Fidelity & Casualty Co.*, 132 A. D. 241, 116 N. Y. Supp. 1042; *Mulcahy & Gibson v. Pacific Const. Casualty Co.*, 79 Misc. 160, 140 N. Y. Supp. 747.

The contract of indemnity must be carefully considered in determining the liability of the indemnitor. *McArthur Bros. v. Kerr*, 140 N. Y. Supp. 527, 155 A. D.

690; *Miano v. Empire State Surety Co.*, 136 N. Y. Supp. 920, 76 Misc. 364.

And the indemnitor does not waive the benefits of the exceptions contained in the contract of indemnity by appearing and defending the action brought by the third party against the indemnitee. *Mason-Henry Press v. Aetna Ins. Co.*, 146 A. D. 181, 130 N. Y. Supp. 961.

Under a clause in the contract with a city for paving and keeping in repair a street, by which the contractor agrees to indemnify the city against claims arising because of his negligence in the performance of the work, the contractor is not liable to the city for a judgment paid by it at the suit of a person injured as a result of a defect in the paved street, even though he failed to comply with a notice from the city to repair the pavement. *City of New York v. Sicilian Asphalt Paving Co.*, 208 N. Y. 45.

§ 48. Liability to third parties.

Where a contract binds the contractor to indemnify the owner against any claims arising against it by reason of his performance of the work, such provision is for the benefit of the owner only, and third parties may not assert any claim against the contractor thereunder. *Haefelin v. McDonald*, 96 A. D. 213, 89 N. Y. Supp. 395.

But if the agreement clearly expresses an intention to make the contractor liable to third parties, they may maintain an action against him on the contract. *Continental Asphalt Paving Co. v. Hudson Manhattan R. Co.*, 128 N. Y. Supp. 226, 143 A. D. 338; *Smyth v. City of New York*, 203 N. Y. 106; *Bradley v. McDonald*, 142 N. Y. Supp. 702, 157 A. D. 572; *Little v. Banks*, 85 N. Y. 263; *Pond v. New Rochelle Water Co.*, 183 N. Y.

330; *Neale v. N. Y. Steam Co.*, 132 N. Y. Supp. 71, 147 A. D. 725.

In the absence of legislative enactment, sureties are not ordinarily liable for the claims of third parties such as material men and laborers against the contractor. Thus a common council of a city may pass an ordinance requiring that every city contract shall contain a provision that contractors shall pay all material men and laborers, and requiring contractors to give a bond to that effect, and further to the effect that such material men and laborers may sue on the bond, and yet an action upon the bond by such third person might be defeated. The council would have no authority to pass such a resolution except for the benefit of the city in the absence of a provision in its charter to that effect. Therefore, the city being under no legal obligation to such third person, and there being no privity between them, no recovery could be had. *Buffalo Cement Co. v. McNaughton*, 35 N. Y. Supp. 453, 90 Hun 74, affirmed 156 N. Y. 702.

Where, however, the charter of a city (City of Lockport) provides such a protection for third parties, they may take advantage of it and hold the sureties upon default of the contractor. *Wilson v. Webber*, 36 N. Y. Supp. 550, 92 Hun 466, affirmed 157 N. Y. 693. And in such a case the surety is liable whether the third party sells on credit or not, although if a note is taken in payment he may be thereby released. *Lyth v. Hingston*, 43 N. Y. Supp. 653, 14 A. D. 11.

But if the case is not one contemplated by the statute, the mere giving of the bond will not entitle the plaintiff to sue upon it. At common law an obligation to which a person is neither a party nor a privy, furnishes no protection or security to that person, and the obligation to him, if any there be, must rest upon some

legislative enactment. *Gifford v. Corrigan*, 117 N. Y. 258; *Townsend v. Rackham*, 143 N. Y. 516; *United States v. Empire State Surety Co.*, 100 N. Y. Supp. 247, 114 A. D. 755.

§ 49. Release of surety.

The rule is, where the party secured does some act which changes the position of the surety to his injury or prejudice, the latter is no longer bound. *Smith v. Molleson*, 148 N. Y. 241.

Therefore payments made up to the amount due, without the production of a certificate required by the contract, do not discharge the surety, unless it can be shown that the advances prejudiced the position of the surety. The circumstances in each case must be considered so that the rule of strict construction may not be extended beyond the reason therefor and result in hardship. *Smith v. Molleson*, 148 N. Y. 241.

But see *St. John's College v. Aetna Indemnity Co.*, 201 N. Y. 335.

In the latter case the plaintiff's agreement with the contractor upon which the defendant was surety, provided for payments upon the architect's certificate. Several payments upon certificates had been made, when the contractor became embarrassed. Thereafter two smaller payments totaling \$2,200.00 were made by plaintiff to the contractor without the production of a certificate, "in order to save him from failing," and "in order that he might pay his workmen." The contractor then failed and plaintiff completed the work at a cost exceeding the contract price and for this excess sued the surety. The court said:

"The defendant invokes the rule that any material alteration of the terms of a contract for whose performance a surety is bound, when made without his

consent, releases him from his obligation as such surety. Such is the rule in this state (*Page v. Krekey*, 137 N. Y. 307; *Smith v. Molleson*). If the parties to the contract had agreed to an alteration of the terms of payment by which the amount due the contractors but remaining in the hands of the owner from time to time would be reduced, it might be claimed with reason that the change was such a material alteration of the surety's obligation that it would not be liable upon the bond. The amount to be retained by the owner from the value of the work actually done is a material safeguard against failure by the contractors to complete the contract. In this case there was no alteration in the contract itself. A new contract was not substituted for the old one. The two payments mentioned were made without reference to the contract and without any changes or modification therein. An advance payment upon the contract by an owner to a contractor may in the same way remove from the contractor a material incentive to his completion of the work. While an advance payment by an owner upon a building contract is not strictly an alteration of the contract itself, it is an act which may be so antagonistic to the interests of the surety and the obligation assumed by him as to relieve him from further obligation to the owner upon his contract of suretyship."

In that case it was held that the payments did not affect the surety adversely so as to void the contract, but at the same time they could not be said to be part of the cost of the building so as to be chargeable to the defendant.

See also *Degnon McLean Co. v. City Trust Co.*, 90 N. Y. Supp. 1029, 99 A. D. 195, 184 N. Y. 544.

The assignment of the proceeds of a contract with

the city's consent is not such an alteration of the contract by the parties as to release the surety. In the case of *City of New Rochelle v. Ætna Indemnity Co.*, 115 N. Y. Supp. 135, 131 A. D. 140, affirmed 198 N. Y. 572, the contract provided that assignment might be made only upon consent. The court held:

“ Even if there had been no such provision in the contract, it is not intimated here that such assignment could in any way interfere with or impair the surety's right of subrogation to complete the contract and be paid according to its terms, on the contractor's default. It would have to be considered whether an assent of the city to pay the money as it came due to the contractor's nominee or assignee would be any change of the contract at all.”

Where the provisions of the contract are waived by the surety, he cannot afterwards claim a discharge because of a failure to comply with the terms of the contract. Such waiver might, for example, be of the provisions as the time for performance, or of the provisions prohibiting payment by the owner beyond a certain percentage of the contract price. *Helman v. City Trust & Safe Deposit Co.*, 98 N. Y. Supp. 51, 111 A. D. 879, 116 N. Y. Supp. 809, 132 A. D. 151.

But the liability of the surety cannot be enlarged beyond the express terms of the contract. The doctrine that the liability of a surety is “ *strictissimi juris* ” means that the surety shall not be held beyond the precise stipulations of his contract. But before the rule of strict construction is applied, the contract itself must be interpreted. And contracts of suretyship are construed by the usual rules applied to all contracts. The situation of the parties at the time of the execution of the contract is to be taken into consideration, and the language interpreted so as to accom-

plish the purpose of the parties. When the contract has been interpreted, the liability of the surety cannot be extended beyond its terms. The rule of strict construction is, however, a rule of application of the contract after its interpretation, and not a rule for the construction of the contract itself. *Gamble v. Cuneo*, 47 N. Y. Supp. 548, 21 A. D. 413, affirmed 162 N. Y. 634; *Fifth Nat'l Bank v. Woolsey*, 52 N. Y. Supp. 829, 31 A. D. 61; *City of Middletown v. Aetna Indemnity Co.*, 106 N. Y. Supp. 375, 121 A. D. 589; *Sachs v. American Surety Co.*, 76 N. Y. Supp. 335, 72 A. D. 60, affirmed 177 N. Y. 551.

“Like all other contracts, the undertaking of a surety must be construed fairly and reasonably and according to the intentions of the parties. If a surety has used ambiguous language, and the party secured has advanced his money on the faith of the interpretation most favorable to his rights, that will ordinarily prevail, if the instrument is open reasonably to such interpretation. It means that a surety shall not be held beyond the precise stipulations of his contract. . . . He has the right to insist on the strict performance of any condition, whether others would consider it material or not.” *Smith v. Molleson*, 148 N. Y. 241.

Thus, in *Mayor of New York v. Reilly*, 59 Hun 501, 13 N. Y. Supp. 521, action was brought upon a bond given to the plaintiff to secure the performance of a sewer contract which provided that work was to be commenced on such a day as should be designated, and completed twenty-three days thereafter. No notice was given, but the contractor voluntarily commenced the work. The commissioner became dissatisfied with the work and sought to abrogate the contract for unnecessary delay and hold the surety. It was held he could not do so because he did not set the time running by

giving the notice. The contract was highly penal, and provided that upon a certificate by the commissioner of unnecessary delay in its performance, he might discharge the contractor and complete the contract himself. Therefore, since the sureties were entitled to notice, they could insist upon receiving it before they could be made liable.

See also *Mayor of New York v. Finn*, 58 Super. 360, 11 N. Y. Supp. 580.

Where a surety is bound to pay a material man for material furnished "when the same shall become due" and the vendor accepts a note in payment, the surety is released. *Lyth v. Hingston*, 43 N. Y. Supp. 653, 14 A. D. 11.

But the acceptance by a creditor of the debtor's time notes for a portion of the debt does not operate to release a surety from his obligation to pay the balance not thus extended. *Klein v. Long*, 50 N. Y. Supp. 419, 27 A. D. 159.

Where the sureties elect to complete a contract upon the default of the principal, they step into the position of the contractor, as it is at the time of the default, and assume the responsibilities with the benefits. The surety is bound from the beginning to complete the contract, and cannot evade the rights of lienors, whose claims remain valid against every installment due or to become due under the contract, whether performed by the principal or the surety. *Harley v. Mapes-Reeve Const. Co.*, 68 N. Y. Supp. 191, 33 Misc. 626.

Where work on the contract is commenced before the bond is given, the sureties cannot escape liability on the ground that there is no consideration for the undertaking. The contract is awarded upon condition that the bond be furnished. Therefore, there is no contract until this condition is complied with. *Smith v. Mol-*

leson, 148 N. Y. 241; *Fulton Grain & Milling Co. v. Auglim*, 44 A. D. 488, 60 N. Y. Supp. 957; *Helios-Upton Co. v. Thomas*, 89 N. Y. Supp. 222, 96 A. D. 401.

See Pingrey on Suretyship & Guaranty, Chapter V.

§ 50. General.

Bonds are for the benefit of the property owners in the case of municipal contracts, and the city officials may be compelled to enforce them. *Eno v. Mayor of New York*, 68 N. Y. 214.

A guaranty agreement is not assignable unless it is within the intention of the parties at the time the agreement is executed that it shall apply to someone not specifically named therein. *Friedlander v. N. Y. Plate Glass Co.*, 38 A. D. 146, 56 N. Y. Supp. 583.

Interest is not allowed in the event of recovery upon a bond for the performance of an act, except from the date of the judgment. *Sachs v. American Surety Co.*, 76 N. Y. Supp. 353, 72 A. D. 60, affirmed 177 N. Y. 551; *Printing Co. v. Hallenbeck*, 61 N. Y. Supp. 1056, 46 A. D. 563.

But see *Degnon McLean Co. v. City Trust Co.*, 99 A. D. 195, 90 N. Y. Supp. 1029, affirmed 184 N. Y. 544.

CHAPTER FOUR.

TIME OF PERFORMANCE.

§ 51. Time of performance not specified.

When no time is specified for the performance of a contract, time is not a condition, and the law presumes that the parties intended performance within a reasonable time. *Taylor v. Goelet*, 126 N. Y. Supp. 1106, 142 A. D. 467, 208 N. Y. 253; *Pope v. Terre Haute Co.*, 107 N. Y. 61; *Eppens Smith Co. v. Littlejohn*, 164 N. Y. 187; *Engineer Co. v. Herring-Hall Co.*, 138 N. Y. Supp. 881, 154 A. D. 123; *Murphy v. U. S. Fidelity Co.*, 91 N. Y. Supp. 582, 100 A. D. 93.

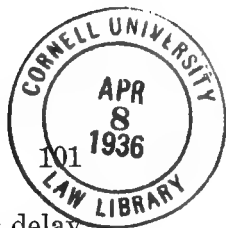
And a material man who fails to deliver material within a reasonable time, and thus prevents the contractor from completing within a date specified in his contract, is liable to the contractor for such delay, even though the material man was unaware that the work was to be finished within a specified time. *Murdock v. Jones*, 38 N. Y. Supp. 461, 3 A. D. 221.

§ 52. Notice necessary before termination of contract.

Where no time for performance is specified or where performance within the specified time has been waived, notice is necessary to restore time as a condition of the contract. Upon a failure of the other party to perform after notice requiring performance within a reasonable time therein specified, the party giving notice may refuse to perform further, and rely on the other's failure as a breach of a condition precedent.

Where an executory contract fixes the time within which it is to be performed, and performance within that time is waived by the parties, neither party can

TIME OF PERFORMANCE.



thereafter rescind the contract on account of such delay without notice to the other requiring performance, within a reasonable time to be specified in the notice, or the contract will be abrogated. By the waiver, time as an essential element of the contract has been removed, but it can be restored by a reasonable notice demanding performance and stating that the contract will be rescinded if the notice is not complied with. And the same rule applies to contracts which, when made, leave the time of performance indefinite. *Lawson v. Hogan*, 93 N. Y. 39; *Schmidt v. Read*, 132 N. Y. 108; *Taylor v. Goelet*, 208 N. Y. 253; *General Supply Co. v. Goelet*, 133 N. Y. Supp. 978, 149 A. D. 80.

See "Waiver of Forfeiture," § 57.

What is a reasonable time for performance's, however, a question of fact to be determined by the jury, after considering the subject-matter of the contract and the surrounding circumstances. *Sullivan v. N. Y. C. R. R.*, 119 N. Y. 354-355; *Franchi v. Brunswick-Balke Collender Co.*, 13 N. Y. Supp. 294. But where the facts are all undisputed, the question may be one of law. *Wright v. Bank of Metropolis*, 110 N. Y. 237; see Chamberlayne's Modern Law of Evidence.

§ 53. Extension of time.

Where a party has verbally extended another's time for performance, and later seeks to revoke such extension because there is no consideration for the extension, if the other party has acted upon the consent to extend the time, and in reliance thereon has allowed the contract time to expire without performance, he is estopped from subsequently recalling such consent, and waives his right to treat non-performance within the original time as a breach of the contract. "The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has

not been acted upon, but it would be most inequitable to hold that a default justified by the consent happening during its extension should furnish a ground for action." Where such consent has been given, no default can be claimed until notice of the withdrawal of the consent is given, although meanwhile the contract has elapsed. *Thompson v. Poor*, 147 N. Y. 402.

See also *Simmons v. Ocean Causeway*, 47 N. Y. Supp. 361, 21 A. D. 30.

In the Charter of the City of New York, § 418, it is provided that no extension of the time for the performance of a contract may be granted except upon unanimous consent of the Board of Estimate and Apportionment. Section 520 of the City Ordinances provides that such extension may be granted by the head of department in charge of the work. The charter is controlling. *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808, 149 A. D. 98.

§ 54. Notice to begin work.

When a contract provides that the work must be completed within a specified length of time, but no dates for the commencement or termination of the contract are provided, the contractor's time for performance does not commence to run until notice to begin work has been given him, even though he has voluntarily commenced work before such notice. Thus, where a contractor is required to commence work "on such day and at such point as the commissioner should designate," before the contractor "could be said to have failed and neglected to enter upon the performance of the contract, the commissioner of public works must have designated a day upon which he was to commence work." *Mayor of New York v. Finn*, 11 N. Y. Supp. 580, 58 Super. 360.

See also *Dady v. Mayor of New York*, 10 N. Y. Supp. 819, 57 Hun 456; *Dwyer v. Mayor of New York*, 55 N. Y. Supp. 930, 34 A. D. 450.

Likewise, where delivery of material is to be commenced within a specified time after date and the rate of delivery to be subject to order by an engineer, "the engineer, by neglecting or refusing to designate the point of delivery, waived the right to take any advantage of the question of time, so long as the engineer did not order the deliveries." *Connecticut Granite Co. v. Trustees Brooklyn Bridge*, 52 N. Y. Supp. 667, 32 A. D. 83, affirmed 159 N. Y. 543.

Where a contract provides that work under a contract is not to be commenced until notice is given, the owner cannot abrogate the contract by refusing to give notice. The failure to give notice may of itself constitute a breach of the contract. *Engineer Co. v. Herring-Hall Safe Co.*, 138 N. Y. Supp. 881, 154 A. D. 123.

No particular form of notice is necessary provided the intention to start the time of performance running is made clear. Where a contract had been awarded for the construction of a school within 300 days, and the superintendent of buildings wrote to the contractor saying that the contract had been approved by the comptroller and that "there need be no delay in the progress of the work," it was held that no further notice was necessary. *Jones v. City of New York*, 65 N. Y. Supp. 747, 32 Misc. 211, affirmed 70 N. Y. Supp. 46, 60 A. D. 61.

See also *New England Iron Co. v. Gilbert E. Ry. Co.*, 91 N. Y. 153.

But if the notice in addition to being a notice to begin work is a notice that the owner has done the necessary preliminary work to enable the contractor to proceed, there is an implied condition that the owner

will so do the preliminary work as to enable the contractor to prosecute his work to the utmost advantage and economy, before giving the notice which sets the time limited in motion.

“Any other construction would destroy the mutuality of the agreement and put it practically in the power of one party to defeat performance by the other.” *Mansfield v. N. Y. Central R. R.*, 114 N. Y. 331; also 102 N. Y. 205.

§ 55. Specified date for performance. Liquidated damages.

Where there is a provision in a contract that the work must be completed by the contractor on a date specified, and from the nature of the contract a failure to comply with such provision must result in loss to the owner, time is of the essence of the contract.

“One who has been deprived of the use of a building or machinery in consequence of inexcusable delay, caused by another who has undertaken to make improvements or repairs, is justly entitled to indemnity for the loss. Such damages are within the reasonable contemplation of the parties.” *Ansonia Brass & Copper Co. v. Gerlach*, 28 N. Y. Supp. 546, 8 Misc. 256.

See also *Mikolajewski v. Pugell*, 114 N. Y. Supp. 1084, 62 Misc. 449; *Wyckhoff v. Taylor*, 43 N. Y. Supp. 31, 13 A. D. 240; *Schlachter v. Hopkins*, 32 N. Y. Supp. 364, 84 Hun 402.

If the delay of the contractor is caused by the owner, or those over whom the owner maintains control, the default of the contractor is waived, and the time for the contractor to perform is extended for a reasonable time after the original time fixed for the performance of the contract, and not merely for the length of the delay. The extension must be for the time of the delay and such additional time as may be made necessary

by reason of the delay. *Mahoney v. Oxford Realty Co.*, 118 N. Y. Supp. 216, 133 A. D. 656.

“ It consequently appears to us that the failure of the plaintiffs to perform on their part operated as a waiver of the performance of the contract as to time, and the defendant consequently had the right to perform his part of the contract within a reasonable time after the plaintiffs had completed their part. The allowing of the defendant thirty days additional time in which to complete the contract, as was done in this case by the referee, does not restore the provisions of the contract which had been waived. It was, in effect, the making of a new contract for the parties by the referee. The defendant having contracted to do this work within a specified time, was bound to have his servants and employees on hand ready to perform within that time. He had the right to assume that the plaintiffs would perform on their part, and, therefore, could properly contract with other parties for the time of himself and employees for any future time not covered by his contract with the plaintiffs. They could not prevent his performance by delays on their part for even a greater period than that specified in the contract in which he was to perform, and then require him to do the work at another time than that named in the contract, and when he might be under obligations to other parties.” *Dannat v. Fuller*, 120 N. Y. 558.

See also *Weeks v. Little*, 89 N. Y. 566; *Thileman v. City of New York*, 81 N. Y. Supp. 773, 82 A. D. 136.

And where the time for performance is so waived, if there be a provision for the payment of liquidated damages it is annulled, even though some of the work not affected by the delay is uncompleted at the time specified. Such damages cannot be apportioned, and

the provision for their payment must either stand or be abrogated. Only actual damages may be recovered for the breach if the contractor fail to perform his contract within a reasonable period after the time fixed. But the parties may preserve to the owner the right to liquidated damages, by providing a means whereby another date for performance may be substituted for the one first named. The court so states in *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 481:

“ It was competent for the parties, anticipating mutations of mind and of conditions, to have provided against a forfeiture of the right to liquidated damages by further agreeing that the architect was empowered to certify an extension of the time for completion if the contractor was delayed in his work in certain specified events or by causes specified. With such a provision the obligation to pay liquidated damages might be preserved and its commencement deferred to a substituted date. Without such a provision, where by mutual fault of the parties, the contractor’s original obligation has been put an end to, how could he come under a new obligation to pay the liquidated damages from some subsequent date? Such an obligation could not be renewed except by some express agreement. Its nature forbids inferring its renewal. An apportionment of the fault is impossible under such a contract.” . . .

“ If respondent failed to complete within a reasonable time after crediting appellants’ delays, then the latter had a cause of action for the former’s neglect and the measure of damages would be the actual loss proved to have been sustained.”

See also *Weeks v. Little*, 89 N. Y. 566; *Thilemann v. City of New York*, 81 N. Y. Supp. 773, 82 A. D. 136;

Holland Torpedo Boat Co. v. Nixon, 115 N. Y. Supp. 573, 61 Misc. 469; *Cornell v. Standard Oil Co.*, 86 N. Y. Supp. 633, 91 A. D. 345; *Wells v. Webster*, 37 N. Y. Supp. 354, 1 A. D. 301; *Sundstrom v. State*, 144 N. Y. Supp. 390.

In this connection it is important to note the distinction which the courts make between liquidated damages and penalty. See "Damages," § 120.

§ 56. Excuses for delay.

It is a well-established rule of law that one party to a contract cannot recover against the other so long as he is himself in default. A party cannot defeat performance of a contract and then set up non-performance as a defense. *Home Bank v. Drumgoole*, 109 N. Y. 63; *Jenks v. Robertson*, 58 N. Y. 621; *Kingsley v. City of Brooklyn*, 78 N. Y. 216; *Dolan v. Rogers*, 149 N. Y. 491; *McLane v. DeLeyer*, 56 N. Y. 619; *Grube v. Schultheis*, 57 N. Y. 669.

On the same principle, the failure of the contractor to perform within the time specified by the contract, may be excused when the delay has been caused by the other party. Such delays caused by the owner as will excuse the contractor, may be classified as here given.

A.

Delays at the request of the owner, or by mutual agreement, or by alterations in or additions to the plans and specifications.

"Where one party to a contract requests delay he cannot defend against the other party because it was granted to him." *Pitts v. Davey*, 81 N. Y. Supp. 264, 40 Misc. 96.

See also *Holland Torpedo Boat Co. v. Nixon*, 115

N. Y. Supp. 573, 61 Misc. 469; *Bigler v. N. Y. & S. B. Trans. Co.*, 5 N. Y. Supp. 347, 52 Hun 613, affirmed 125 N. Y. 677; *Birkett v. Nichols*, 184 N. Y. 315; *Cook v. Odd Fellows Union*, 1 N. Y. Supp. 498, 49 Hun 23; *Gallagher v. Nichols*, 60 N. Y. 447.

And it is possible for parties to so alter a contract by parol agreement even where the contract provides that no alteration or modification can be made in the contract except by written agreement.

“ This was a contract to manufacture and deliver goods at a specified date in the future and the time of delivery was changed in the interest and for the accommodation of both parties. It was, therefore, in the power of the parties to change the terms of the contract by parol as to time.” *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369.

See also *Dunn v. Steubing*, 120 N. Y. 232.

That the contract contains a provision to the effect that the owner may request alterations in the plans, and that the same shall not void the contract, does not alter the rule that the contractor's time of performance will be extended thereby. In the case of *Small v. Burke*, 86 N. Y. Supp. 1067, 92 A. D. 338, the contract contained the following clause:

“ Should the owner at any time during the progress of the said buildings request any alterations, deviations, additions or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the same may be, by a fair and reasonable valuation.”

The court decided:

“ Clearly the parties intended that changes and alterations should not annul the remaining part of the contract; but it was not contemplated that the owner was to be at liberty to require a substitution of ma-

terial or other change in the work which would necessarily delay the remaining work covered by the original contract, and that the contractor was to take the risk of such delay, and be obligated notwithstanding it, to perform the contract work within seventy-two working days. The rule in such a case is that the contractor is to be allowed for the time that the final completion of the contract work is necessarily delayed by any changes, alterations, or omissions ordered by the owner.”

B.

Delays caused by other contractors controlled by the owner.

“ The plaintiffs adduced evidence to show that their work was so connected with that of others employed by the defendant upon the building, that, at times, its progress necessarily depended upon that of the other work, and that, in consequence of delays in that they were prevented from completing their work within the time limited in the contract. The jury found these facts in their favor.”

“ It is a sufficient excuse for the non-performance of a building contract, within the time stipulated, that the contractor was prevented from doing so by the act of the other party.” *Stewart v. Keteltas*, 36 N. Y. 388.

In *Lentilhon v. City of New York*, 102 A. D. 548, 92 N. Y. Supp. 897, affirmed 185 N. Y. 549, the court said:

“ While damages may not be recovered for the acts of an inspector in improperly rejecting the materials and thus delaying the work (*Montgomery v. Mayor*, 151 N. Y. 245), they may be recovered for unreasonable delay, on the part of the party for whom the contract work is being done in permitting the contractor to proceed, or performing conditions precedent to his duty to proceed, or unreasonable interference with the

contract work, or with other contractors over whom control has been reserved.”

See also *McMaster v. State*, 108 N. Y. 542; *Curnan v. D. & O. R. R. Co.*, 138 N. Y. 480; *Genovese v. Third Ave. R. R. Co.*, 13 A. D. 412, 43 N. Y. Supp. 8, affirmed 162 N. Y. 614; *Thilemann v. City of New York*, 82 A. D. 136, 81 N. Y. Supp. 773; *Rogers v. City of New York*, 71 A. D. 618, 76 N. Y. Supp. 1029, affirmed 173 N. Y. 623; *Mahoney v. Oxford Realty Co.*, 118 N. Y. Supp. 216, 133 A. D. 656; *Cornell v. Standard Oil Co.*, 86 N. Y. Supp. 633, 91 A. D. 345; *Ryan v. City of New York*, 143 N. Y. Supp. 974, 159 A. D. 105.

C.

Delays caused by the failure of the owner to perform necessary conditions precedent to the contractor's performance.

Where the owner agrees to supply material for the performance of the work and fails to do so in time to permit the contractor to perform, the provision as to time is waived. *Callanan Road Imp. Co. v. Village of Oneonta*, 101 N. Y. Supp. 1056, 117 A. D. 332.

Likewise if the owner fails to complete work necessary to be done before the contractor can perform his contract and the contractor is thereby delayed, the contractor's default is waived. In *Mansfield v. N. Y. C. R. R.*, 102 N. Y. 205, 114 N. Y. 331, plaintiff contracted with the defendant to build a superstructure of an elevator, work to be commenced within five days after notice, and to be completed within five months under a penalty of \$500.00 for each day in excess of five months that the work was not completed. Notice was given to commence work, but at the time the foundation was not completed, so that the plaintiff could not go ahead with the work, and plaintiff protested. Plaintiff sued for damages for the extra work by rea-

son of the defendant's failure to have the foundation ready so that the plaintiff could proceed.

The court held:

"After express notice to the defendants of their intention to hold them liable for the damages arising from the omission to complete the foundations they elected to commence the prosecution of the work. This they were entitled to do, and it constitutes no waiver of their claim."

"When the obligation of performance by one party to a contract presupposes the doing of some act on the part of the other prior thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned, against the defaulting party."

See also *Grannis & Hurd Lumber Co. v. Deeves*, 25 N. Y. Supp. 375, 72 Hun 171, affirmed 147 N. Y. 718.

Where a permit from a city building department is required before the commencement of work and the owner fails to secure the same so that the contractor is delayed, even though nothing is said in the contract concerning the same, there is an implied obligation on the owner's part to secure such permit in time to allow the contractor to proceed and finish the work in the time specified.

"The rule of law is that when the obligation of performance by one party to a contract presupposes the doing of another act by the other party there arises an implied obligation of the second party to do the act which the performance of the contract necessarily involves." *Weeks v. Rector of Trinity Church*, 67 N. Y. Supp. 670, 56 A. D. 195.

This is so in the case cited in spite of the implied obligation on the part of the contractor not to commence work until the permit has been secured, because the parties made time of the essence of the contract by naming a penalty for non-performance, and the owner was, therefore, obliged to secure the permit in time to enable the contractor to proceed and finish in the time specified.

See also *Siniscalchi v. Pennachio*, 113 N. Y. Supp. 1003; *Simmons v. Ocean Causeway*, 47 N. Y. Supp. 361, 21 A. D. 30; *N. Y. Architectural T. C. Co. v. Williams*, 92 N. Y. Supp. 808, 102 A. D. 1.

But it has been held that a material man cannot excuse his delay in performance on the ground that the architect did not deliver to him drawings necessary to enable him to proceed, when he did not request the same, and it is customary to make such request, and the plans were delivered as soon as requested. *Murdock v. Jones*, 38 N. Y. Supp. 461, 3 A. D. 221.

See also *Newman Lumber Co. v. Wemple*, 56 Misc. 168, 107 N. Y. Supp. 318; *Norcross v. Wills*, 114 N. Y. Supp. 968, 130 A. D. 412.

D.

Delays caused by the refusal of the owner to give defendant possession of the property.

There is an implied agreement that an owner contracting to have excavations made for a building, will give the contractor possession of the premises to enable him to do the work, and also that he will do nothing to hinder or obstruct him in the performance of his contract. *Genovese v. Third Ave. R. R. Co.*, 43 N. Y. Supp. 8, 13 A. D. 412, affirmed 162 N. Y. 614; *Vandegrift v. Cowles Eng. Co.*, 161 N. Y. 435.

E.

Delays caused by operation of law.

Where the further prosecution of work in the alteration of a building is forbidden by the superintendent of buildings because of a defect not occasioned by the contractor, and he is thus prevented from performing that which by the terms of the contract is made a condition precedent to payment, he is thereby discharged from performance, and is entitled to recover at the contract price for the work done. See *Heine v. Meyer*, 61 N. Y. 171, where the court held:

“He was, therefore, not only justified in stopping, but prevented by the act of the law from fulfilling his contract, and thereby discharged from the performance of the conditions precedent to his right to the payments therein agreed to be made. That, however, did not deprive him of compensation for what he had done in part performance of those conditions.”

See also *Hart v. City Theatres Co.*, 141 N. Y. Supp. 386, 156 A. D. 673.

In *Dady v. Mayor of New York*, 10 N. Y. Supp. 819, 57 Hun 456, the contractor engaged to grade a street. There was a statute which gave sewer work precedence over all other work, and most of plaintiff's delay was due to the fact that a sewer was being built. The court said:

“In other words the position of the appellant appears to be that the city can avail itself of this statute to interfere with a street contractor's work and then charge him \$20.00 a day for the delay which it thus occasions. Further discussion of this contention seems unnecessary.”

In the case of *Small v. Burke*, 86 N. Y. Supp. 1067, 92 A. D. 338, the court says:

“ The respondent claims that, by paragraph 12 of the contract, which provides that the contractor shall, at his own expense, ‘ comply with all sanitary laws, ordinances and rules, and all other orders of the board of health or other authorities, affecting the cleanliness, safety, occupation and use of the said premises, and the sidewalk and the street in front of the same,’ the appellant assumes the risk of delays arising from violations of the building laws and ordinances. We are of the opinion that this provision of the contract must be limited to the work which the contractor undertook to perform, and that as between him and the owner, he did not become an insurer of the sufficiency of the plans, or assume any responsibility for delays caused by the interference of the authorities, owing to the fact that the plans and specifications had not been prepared in accordance with law, or in conformity to the lawful requirements of the local authorities.”

F.

Delays caused by the failure of the owner to make payment to the contractor in accordance with the contract.

In *Wright v. Reusens*, 133 N. Y., at page 305, the court says:

“ If, as the referee has found, performance by the plaintiff was prevented by the default of the defendant in making the payments according to the terms and meaning of the contract, then the failure of the plaintiff to have the work completed at the time named is excused. (*Kingsley v. City of Brooklyn*, 78 N. Y. 200.)

“ When the employer under such circumstances terminates the contract and arrests its performance, the contractor may recover in a proper action the value of the work performed and the materials furnished. (*Clark v. Mayor, etc.*, 4 N. Y. 338; *Jones v. Judd*, id.

412-414; *Dillon v. Anderson*, 43 id. 237; *Lawson v. Hogan*, 93 id. 39.)”

But the owner's time to make the payments may be extended by circumstances without the control of the parties. As, for example, where a mechanic's lien is filed and remains unsatisfied of record at the time when the installment becomes due, the owner's failure to make payment will not justify the contractor's breach. The owner in such a case is entitled to a reasonable time after the satisfaction of the lien within which to make the payment. *Williams v. City of New York*, 114 N. Y. Supp. 652, 130 A. D. 182.

G.

Delays caused by the occurrence of an unusual circumstance when it is provided against in the contract.

See “Impossibility of Performance,” § 38.

Unjustifiable rejection of materials by an inspector appointed under the contract will not, however, excuse delay thereby caused the contractor. Such delay is an incident of the contract which the contractor should have considered before entering into the contract. In *Montgomery v. Mayor of New York*, 151 N. Y. 249, the court said in considering this question:

“It would be extraordinary and we think it would constitute an unsafe precedent in future cases if contractors with the city under these contracts could maintain actions against it for damages, where the execution of the work contracted for was delayed upon the ground that the delay was caused by the officers who by force of the contract were invested with power of supervision.”

See also *Lentilhon v. City of New York*, 102 A. D. 548, 92 N. Y. Supp. 897; *Burgard v. State*, 114 N. Y. Supp. 550, 61 Misc. 23.

This does not mean, however, that the contractor must submit to an unreasonable interference by an architect or supervising engineer, who is appointed by the parties as arbiter of the parties on certain matters, such as regarding the construction of the specifications. As to the matter specified, the architect is considered as the representative of both parties, but in other respects he is the agent of the owner who may be charged with delays caused by him. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 481.

Whether the owner is chargeable with such delays is a question of fact and the jury may so find without also finding the architect guilty of fraud or bad faith. *Franchi v. Brunswick-Balke Collender Co.*, 13 N. Y. Supp. 294.

§ 57. Waiver of forfeiture.

Where there is a provision in a contract requiring performance within a time specified, and the contractor fails to perform, two courses are open to the owner. He may either permit the contractor to continue and complete the performance of the contract, and hold him liable for the damages occasioned by the delay, whether such damages be liquidated or the actual damage incurred; or the owner may elect to declare the contract forfeited and rescind it. The covenant on the part of one party to the contract to perform within a certain time and the covenant on the part of the other to pay, are independent and distinct, and a right of action may grow out of either. Where no time of performance is specified and the contract is to be performed in a reasonable time, the owner may give notice that performance will be required within a reasonable time after notice, and rescind the contract on failure to so perform or allow the contractor to complete the

contract and recover damages resulting from the delay. See §§ 51 and 52.

Therefore, the fact that an owner does not terminate a contract, because of the contractor's failure to complete it within the time specified, does not prevent the recovery of damages by way of counterclaim for the delay. The owner cannot defend against an action by the contractor to recover for the work done, on the ground that the work was not performed in the time agreed upon; but he can counterclaim for the damages occasioned by the delay, or bring a separate action against the contractor to recover such damages.

"Undoubtedly the defendant had the right to terminate the contract if the plaintiff was not proceeding with that diligence which the terms of the contract required. But this was not his only remedy. He had the right to let the plaintiff go on and complete the work, and then he had a right to say: 'I will pay you for the work you have done, but I want the damages you have caused me in not doing my work as you agreed to do it.' " *Grannis & Hurd Lumber Co. v. Deeves*, 25 N. Y. Supp. 375, 72 Hun 171, affirmed 147 N. Y. 718.

See also *Dunn v. Steubing*, 120 N. Y. 232; *Kelly v. St. Michael's Roman Catholic Church*, 133 N. Y. Supp. 328, 148 A. D. 767.

"Mere payments on account of a contract do not constitute a waiver of a claim for damages for failure to complete within the specified time. Merely permitting a contractor to complete his contract after the time specified does not prevent the other party from asserting his damages caused by the delay. If he has accepted the work and has not terminated the contract because of the delay, such failure to perform within the specified time is not a defense to an action for the contract price. The fact of acceptance permits an

action for the price, but it does not prevent the other party from offsetting by way of counterclaim the damages which he has suffered from the delay." *Reading Hardware Co. v. Pierce*, 113 N. Y. Supp. 331, 129 A. D. 292.

The court intimates, however, that under certain circumstances the payment in full might be a waiver of damages, if the damages for failure of the contractor to perform were to be taken out of the last payment due, and the payments made exceeded the amount which should have been retained under the contract to meet such damages. *Coulter v. Board of Education*, 63 N. Y. 365; *Oberleis v. Bullinger*, 27 N. Y. Supp. 19, 75 Hun 248; *Deeves v. Manhattan Life Ins. Co.*, 195 N. Y. 324; *Gallagher v. Nichols*, 60 N. Y. 447; *Ruff v. Rinaldo*, 55 N. Y. 664; *Mikolajewski v. Pugell*, 114 N. Y. Supp. 1084, 62 Misc. 449; *Crocker Wheeler Co. v. Varick Realty Co.*, 88 N. Y. Supp. 412, 43 Misc. 645; *Parke v. Franco-American Trading Co.*, 120 N. Y. 51; *Pitt v. Davey*, 81 N. Y. Supp. 264, 40 Misc. 96; *McKee v. Rapp*, 35 N. Y. Supp. 179; *Beyer v. Henry Huber Co.*, 100 N. Y. Supp. 1029, 115 A. D. 342; *Brady v. Cassidy*, 145 N. Y. 171; *Clarke v. West*, 193 N. Y. 349.

It does not follow, however, that because the owner fails to eject the contractor at once upon the expiration of the time limited for performance that the contractor may go on indefinitely in his efforts to perform.

But in such a case it would be necessary before the contract could be rescinded after waiver of performance within the time originally fixed, for the owner to give notice to the contractor requiring him to perform within a specified reasonable time, in order to again restore time as an element of the contract. *Taylor v. Goelet*, 208 N. Y. 253.

And the intimation in the opinion in *Wyckhoff v. Taylor*, 43 N. Y. Supp. 31, 13 A. D. 240, that where an owner allows a contractor to proceed in an attempt to complete the work after the expiration of the time fixed for performance that the failure on the contractor's part to complete the work is a continuous breach of the contract of which the owner may avail himself at any time without first giving notice restoring time as an element of the contract, seems to be unfounded.

It is to be noted, however, that notice of intention to rescind is only necessary when the party to the contract proceeded against has merely delayed performance, not where he has abandoned the contract, or treated it as terminated or where he has refused to perform. *Taylor v. Goelet*, 208 N. Y. 253.

And a waiver by the owner of his claim for liquidated damages for the delay of the contractor is not an admission that the delay has been caused by the owner.

“ In the settlement with him the city's officers did not see fit to charge him for the delay while waiting for some arrangement to be made about the pipe, but allowed him the forty-three days during which the delay continued. On that account it is said that the fact that they allowed him the forty-three days operates as an admission on the part of the city that it was responsible for that delay. But it cannot be said that, if the city saw fit to waive its right to charge liquidated damages against him that is any reason why it should be charged with damages for which it is not responsible.” *Mairs v. City of New York*, 65 N. Y. Supp. 160, 52 A. D. 343, reversing 62 N. Y. Supp. 351, 30 Misc. 384.

See also *Sundstrom v. State*, 144 N. Y. Supp. 390.

§ 58. Ejection of contractor for delay.

It is customary to incorporate in improvement contracts a provision giving to the owner the right where the contractor fails to proceed diligently to remove the contractor and complete the work himself and pay to the contractor any balance remaining after deducting the cost of completing the work from the contract price. The usual clause permits such action to be taken on notice to the contractor, after certification to the owner by a designated arbiter that the work is being unnecessarily delayed. It has already been noted that where the contract provides that the work must be completed by a specified date or where there is no time fixed for performance and the contract is, therefore, to be performed within a reasonable time, that the owner has the right to put an end to the contract because of the failure to perform, by serving notice on the contractor to that effect. See § 52.

Accordingly when a contract provides that the work must be completed within a specified date and also that for failure to perform diligently that the owner may eject the contractor and complete the work on his account, the owner does not have to complete the work under the latter clause, but may cancel and put an end to the contract if the contractor has not completed by the date specified.

“Where a defendant, an owner, elects to terminate an employment pursuant to a provision of the contract and proceeds personally with the completion thereof he must pay the contractor the amount of the contract price less the amount necessary for the completion thereof as provided by the provision of the contract authorizing the termination of the employment. If he is to stand on his legal rights apart from the permissive authority given to him under the contract to

take possession and complete the contract he should clearly assert such legal rights and terminate the contract itself. (*Ogden v. Alexander*, 140 N. Y. 356.)” *Fraenkel v. Friedman*, 199 N. Y. 351.

See also *Hermann & Grace v. Hillman*, 203 N. Y. 435; *Steiger v. London*, 141 A. D. 382, 126 N. Y. Supp. 256.

“ The owner, however, although under no obligation to do so, completed the building herself, according to the contract, which thus continued operative through her action. After the contractor refused to proceed she performed the contract for him, as it expressly permitted her to do. As her action was according to the contract, it will be presumed, under all the circumstances and in support of the judgment, that it was under the contract.” *Van Clief v. Van Vechten*, 130 N. Y. 580.

See also *Nat’l Contracting Co. v. Hudson W. P. Co.*, 103 N. Y. Supp. 641, 118 A. D. 665; also 97 N. Y. Supp. 92, 110 A. D. 133; *Wakeham & Miller v. Roman Catholic Church*, 150 A. D. 159, 134 N. Y. Supp. 736.

When an architect or engineer or other person is named as arbiter as to the diligence of the performance of the work by the contractor, his decision in the absence of fraud or plain and palpable mistake is final, whether the contract so specifies or not. And the arbiter need not necessarily obtain his information at first hand, but may rely upon reports from inspectors. *Mahoney v. Oxford Realty Co.*, 118 N. Y. Supp. 216, 133 A. D. 656; *Genovese v. Third Ave. R. R.*, 43 N. Y. Supp. 8, 13 A. D. 412, affirmed 162 N. Y. 614; *Lantry v. Mayor of New York*, 44 N. Y. Supp. 874, 19 Misc. 558.

When an owner wrongfully gives notice of his intention to eject the contractor, the failure of the con-

tractor to protest does not constitute an acquiescence in the breach. *Simmons v. Ocean Causeway*, 47 N. Y. Supp. 361, 21 A. D. 30.

The contractor can under such circumstances recover on a *quantum meruit* action, the difference between the amount paid on account of the work performed to the date of the ejectment and the reasonable value of such work. See "Damages," §§ 117 and 118.

When the owner exercises his option to eject the contractor and complete the work, under such a clause all that is required of the owner is good faith and reasonable care in completing the work. *Watts v. Board of Education*, 41 N. Y. Supp. 141, 9 A. D. 143.

Computation.

See "General Construction Law," §§ 20 and 58. *Biggs v. City of Geneva*, 100 A. D. 25, 90 N. Y. Supp. 858, and cases cited therein; *Aultman & Taylor v. Syme*, 163 N. Y. 54; *Sugerman v. Jacobs*, 145 N. Y. Supp. 429, 160 A. D. 411.

Time of payment.

See "Payment," § 105.

CHAPTER FIVE.

CERTIFICATES AND ARBITRATION.

§ 59. Certificates as condition precedent.

There is usually a provision in construction contracts that proper performance by the contractor shall be evidenced to the owner by the production of a certificate from an architect or engineer to that effect. In such cases the production of the certificate is of course a condition precedent to recovery. The certificate must either be produced or its absence properly accounted for, before recovery will be permitted.

In the case of *Granger v. B-K Iron Works*, 204 N. Y. 218, the action was brought to recover the balance due on a written contract which contained the following provision:

“Terms net cash. Immediate payment after written acceptance by the architect.”

The complaint did not set forth anything about this provision. The plaintiff failed to prove any written acceptance by the architect prior to the commencement of the action, but introduced in evidence over exception a certificate dated eighteen months after the commencement of the action. Objection was made that the acceptance by the architect was a condition precedent to recovery. The court said:

“No such written acceptance had been given up to the time of the commencement of the action. When the suit was begun, therefore, the plaintiff’s case was fatally defective in an element essential to make out a cause of action under the contract. The contract did not obligate the defendant to pay until the written

acceptance had been obtained, consequently there was no obligation to pay when the action was commenced. The subsequent acceptance, or certificate issued many months afterward, could not relate back so as to place the defendant in default. It was wholly irrelevant, and the court erred in receiving it and in instructing the jury that they might treat it as timely. In an action at law the status of the parties is to be considered as it existed when the suit was begun, unless changed conditions have been brought before the court by means of supplemental pleadings, which was not the case here."

But unless the production of the certificate is clearly made a condition precedent this may not be so. In *Gillies v. Manhattan Beach Imp. Co.*, 147 N. Y. 420, it is said:

"When a contract for work stipulates that the amount due the contractor shall be evidenced by a certificate of a civil engineer, such a certificate is not deprived of its effect as evidence, in an action to recover the amount claimed by the contractor, merely by the fact that it was made after the commencement of the action, when the contract does not make such certificate an indispensable condition of maintaining any action."

See *Bell v. Fox*, 113 N. Y. Supp. 231, 129 A. D. 405; *Weeks v. O'Brien*, 141 N. Y. 199; *Smith v. Wetmore*, 167 N. Y. 234.

In the case of *Excelsior Terra Cotta Co. v. Harde*, 85 N. Y. Supp. 732, 90 A. D. 4, the court said:

"The contract provided that the payments were to be made upon the certificate of the architect. It is true that the complaint alleges that the architect wrongfully withheld the certificate, but the findings made by the trial court show that this is not the fact.

Plaintiff had not performed his part of the contract, and, therefore, was not entitled to be paid. Under a clause in a contract of this character the obtaining of the certificate is indispensable to a recovery."

When the contractor is to be paid according to a certificate, without which the opposite party cannot know for what or how much he is to pay, there can be no default on his part until he is informed of and shown a certificate and a demand is made thereon. *Wangler v. Swift*, 90 N. Y. 38.

Every contract must be construed according to its own terms. And the mere fact that work is made subject to acceptance by an architect, is not to state that because he does accept the work, that it must necessarily be satisfactory to the owner. The distinction may be made between the contract which requires the owner to pay on the production of an architect's certificate, and that which merely requires work to be done to the architect's satisfaction.

In the latter case the acceptance by the architect does not bind the owner if the work is not in accordance with the contract and specifications. See *Glacius v. Black*, 50 N. Y. 145, where the provision of the contract read as follows:

"That the materials to be furnished shall be of the best quality and the workmanship performed in the best manner subject to the acceptance or rejection of ———, Architect, and all to be in strict accordance with the plans and specifications which are signed by the parties, and form part of this contract."

It was likewise held in *Rusling v. Union Pipe Const. Co.*, 39 N. Y. Supp. 216, 5 A. D. 448, that a contract for work to be done by the plaintiff for the defendant, providing that the defendant's engineer should on the first of each month estimate the amount of work done in the month previous, and return a certificate thereof to the defendant who should pay the plaintiff a certain

portion of the contract price, does not impose on the plaintiff a duty to obtain a certificate before the payment is made to him, as the estimate of the engineer is solely for the benefit of the defendant.

§ 60. Required on quantum meruit.

The production of the certificate is required after a complete performance of the contract, even though the action is brought on *quantum meruit*. *Gillies v. Manhattan Beach Imp. Co.*, 26 N. Y. Supp. 381, 73 Hun 507, 147 N. Y. 420.

§ 61. Certificates to excuse delay.

In contracts which require performance within a specified time, it is sometimes provided that in computing the same, the time during which the work is delayed in consequence of any act of the owner shall be excluded; and some designated authority is provided to certify as to what length of time is to be excluded. In such cases where the contractor sues he is not required to produce the certificate excusing delay, unless the owner pleads and proves that the time limit was exceeded. Then if the contractor desires to be relieved he must produce the certificate excusing his delay.

Thus in *Phelan v. Mayor*, 119 N. Y. 86, where an action was brought to recover a sum retained by the city as damages due to the contractor's delay under such a contract as is here described. The defendant alleged that the work was not completed in the prescribed time, but exceeded it by 375 days and that the amount claimed had been retained. The plaintiff requested the court to submit the question to the jury as to whether or not the delay was caused by the defendant. The court refused. It was held:

“ The inspector’s fees were a proper charge under the contract unless, according to the provisions quoted, the delay was occasioned by the act or omission of the city. But by the terms of this clause it was a condition precedent to any right of the plaintiff to be relieved from the allowance of inspector’s fees, that the matter should have been submitted to, and determined by the commissioner of public works, and this was not done. If the commissioner had neglected or refused to act when called upon to do so, a different question would be presented.”

In *Dady v. Mayor*, 10 N. Y. Supp. 819, 57 Hun 456, the court discusses the same proposition, as follows:

“ The provision seems designated to enable the defendants, if so disposed, to appeal to the commissioner of public works to decide how much time should be excluded from the 300 days by reason of the city’s interference with the due prosecution of the work by the contractors, so that if the contractors claimed too large a deduction on that account this officer should act as an arbiter between the parties previously chosen or consented to by both. Unless the city called him in to compute the delay, however, the contractors were certainly not bound to do so.”

And in *Toop v. Mayor of New York*, 13 N. Y. Supp. 280, it was held:

“ The decision in that case (*Phelan v. Mayor*) extends no further than that upon proof by the defendants that the time employed by the performance of the work exceeded the time allotted by the contract, the defendant is entitled to a deduction from the contract price agreed upon to be paid for the work, of the liquidated damages fixed for each day in excess of the allotted number of days, and that if the contractor desires to defeat or diminish the deduction for such

liquidated damages, it is incumbent upon him to procure a certificate of the commissioner of public works excusing the delay, or part of such delay, or to show that such a certificate had been demanded and that the commissioner had neglected to act in the premises.”

See also *Callanan Road Imp. Co. v. Village of Oneonta*, 101 N. Y. Supp. 1056, 117 A. D. 332.

§ 62. Decision final in absence of fraud or palpable mistake.

When the contract provides that an architect or engineer is to determine all questions arising during the performance of the work, or that payment is to be made on his certificate only, the architect or engineer becomes vested with the powers of an arbitrator, and his determination is final in the absence of fraud or palpable mistake. *Brady v. Mayor of New York*, 132 N. Y. 415; *Molloy v. Village of Briarcliff Manor*, 145 A. D. 483, 129 N. Y. Supp. 929; *Smith v. Mayor of New York*, 42 N. Y. Supp. 522, 12 A. D. 391; *Sewer Commissioners v. Sullivan*, 42 N. Y. Supp. 358, 11 A. D. 472, 162 N. Y. 594; *Snyder v. City of New York*, 77 N. Y. Supp. 637, 74 A. D. 421; *Zimmerman v. German Church*, 31 N. Y. Supp. 845, 11 Misc. 49; *Gay v. Haskins*, 31 N. Y. Supp. 1022, 11 Misc. 134; *Atlantic Gulf Co. v. Woodmere Realty Co.*, 142 N. Y. Supp. 953, 156 A. D. 351; *Sundstrom v. State*, 144 N. Y. Supp. 390.

In *Duell v. McCraw*, 33 N. Y. Supp. 528, 86 Hun 331, the contract contained a provision to the effect that in case of any dispute as to the interpretation of the drawings and specifications, that the same should be decided by the architect, whose decision should be final. It was claimed that the work was defective and that the plaintiffs failed to lay a concrete basis for one of the walls. This was not required by the architect

and the defendant claimed that the architect had no authorization to dispense with it under the terms of the contract above quoted. The court held:

“ We are, however, inclined to think that he had. That was his interpretation of the provision, and under the contract, in case of doubt in the construction or meaning of the drawings or specifications he was the arbiter. He accepted the walls knowing that the concrete was not there.”

In *Camden Iron Works v. Masterson*, 93 N. Y. Supp. 754, 104 A. D. 273, the defendant had a contract with the city to lay certain iron pipes. The plaintiff agreed to supply the pipe in accordance with the specifications of the defendant's contract with the city. These required that the pipe should be free from defects and subject to inspection, by the city inspectors. The inspectors rejected the pipe. There was no evidence of bad faith on the part of the inspectors. The court held:

“ In the absence of any proof of bad faith on behalf of Masterson, the city or the inspectors in rejecting the pipe manufactured by the plaintiff, the plaintiff could not insist that its pipe should be accepted by the inspectors.”

§ 63. What constitutes bad faith and mistake.

The arbiter must exercise his honest judgment upon the facts which he knows or should know. And in order to defeat the finality of a certificate it is not necessary that the arbiter should exercise conscious dishonesty. Bad faith does not always mean absolute fraud. It may mean an arbitrary or capricious act. If there are no facts upon which the judgment stated in the certificate could have been based, then the certificate is not given in good faith. What the actual

facts are may be presented to the jury for them to determine whether the certificate is made in good faith. *Wakefield Const. Co. v. City of New York*, 142 N. Y. Supp. 743, 157 A. D. 535.

Likewise a certificate may be disputed because of a mistake of law, and the mistake need not appear upon the face of the certificate.

So where an engineer under an erroneous interpretation of the provisions of the contract excludes from the final certificate work actually done by the contractor, and which was required by the contract when properly interpreted, his decision may be attacked for palpable error. *Molloy v. Village of Briarcliff*, 129 N. Y. Supp. 929, 145 A. D. 483; *Burke v. Mayor of New York*, 7 A. D. 128, 40 N. Y. Supp. 81; *R. J. Packard Co. v. City of New York*, 137 N. Y. Supp. 9, 151 A. D. 941; *Merrill-Ruckgaber Co. v. City of New York*, 145 N. Y. Supp. 577, 160 A. D. 513; *Uvalde Contracting Co. v. City of New York*, 145 N. Y. Supp. 604, 160 A. D. 284.

An architect may act in a dual capacity. He may be an arbitrator between the parties as to the satisfactory performance of the work, and at the same time a superintendent or supervisor for one of the parties. While acting in the first position his decisions as to any disputes arising are binding in the absence of fraud or mistake. *Genovese v. Third Ave. R. R.*, 43 N. Y. Supp. 8, 13 A. D. 412, affirmed 162 N. Y. 314.

See also *Wyckoff v. Meyers*, 44 N. Y. 143; *Woarms v. Becker*, 84 A. D. 491, 82 N. Y. Supp. 1086; *Becker v. Woarms*, 72 A. D. 196, 76 N. Y. Supp. 438; *Smith v. Brady*, 17 N. Y. 173; *Hart v. City of New York*, 201 N. Y. 45.

It should be noted that the decision of the architect or engineer may be final even though it is not stated

in the contract that it shall be. It was so held in the case of *Mahoney v. Oxford Realty Co.*, 118 N. Y. Supp. 216, 133 A. D. 656. There the contract provided that upon a certificate by the architect that the contractor had failed to prosecute the work with diligence, the owner might on three days' notice eject the contractor, complete the work and charge the cost thereof against the contract price; and it further stipulated that the expense of completing such contract and any damages incurred through the contractor's default "shall be audited by the architects, and their certificate shall be conclusive on the parties." It was contended that the certificate of the architect was not final and that even though he acted in good faith, the subject was still subject to review. The court said that such an interpretation would make a provision of this kind a mere trap for the owner, as the contractor might refuse to perform diligently, and the only redress of the owner would be to complete the contract himself and then account to the contractor for any possible balance. It was held:

"We are of the opinion that this provision of the contract was intended by the parties to make the certificate of the architects conclusive on this question, in the absence of evidence from which an inference might fairly be drawn that their action was fraudulent or so unreasonable and arbitrary as to indicate bad faith or fraud."

"Where the certificate is refused in good faith because in the opinion of the architect in the exercise of his judgment, on a question delegated to him under the contract as in this case, in deciding whether the contractor was proceeding with such diligence as to insure the completion of the building within the period specified, or within a reasonable period, then I think

the rule applicable to certificates stipulated to be final, which is that they are only impeachable for fraud or bad faith should apply here, although there is no express stipulation as to the effect of the certificates on these points."

See also *Kausen v. Leonhardt Realty Co.*, 140 N. Y. Supp. 493, 79 Misc. 621.

Attention must, however, be paid to the expressed intention of the parties, and when they provide that the certificate shall not be binding upon the parties there is no rule of law which can override their agreement to that effect. In such a case the certificate may furnish only *prima facie* evidence of performance. *Farrel v. Levy*, 124 N. Y. Supp. 439, 139 A. D. 790.

And where a contract provides that only the final certificate and final payment shall be conclusive evidence of performance, if after the work is done the architect gives a certificate saying that the contractor is entitled to the second payment, such certificate is not the final certificate contemplated by the contract. *Gay v. Haskins*, 31 N. Y. Supp. 1022, 11 Misc. 134.

It is only the final certificate which is binding upon the parties. Intermediate estimates or classifications are not binding. *Dorwin v. Westbrook*, 71 Hun 405, 24 N. Y. Supp. 955.

Also a certificate may be binding on one party and not on the other. *O'Brien v. Mayor of New York*, 139 N. Y. 543.

Where a contract contains a provision that the owner is not to be estopped by the certificate of performance "from at any time showing the true and correct amount and character of the work," the owner cannot challenge the certificate for a failure of performance. The only right reserved is to challenge the amount or quantity of work done, and also the classifi-

cation of the work, *i. e.*, whether certain work should be classed as earth work, rock work or otherwise. *Brady v. Mayor of New York*, 132 N. Y. 415; *Quinn v. Mayor of New York*, 45 N. Y. Supp. 7, 16 A. D. 408; *O'Brien v. Mayor of New York*, 139 N. Y. 543.

But the right of the owner to recover damages for the breach of an express warranty may survive the delivery of a certificate of performance. *Condict v. Onward Const. Co.*, 210 N. Y. 88.

A mere error of judgment on the part of the architect or engineer, or a small error in calculation, is not sufficient to impeach his decision. It can be challenged, however, because of a palpable mistake appearing upon the face of the award, such as a clerical error, an error in computation or a clerical omission. *Molloy v. Village of Biarcliff Manor*, 129 N. Y. Supp. 929, 145 A. D. 483, and cases cited; *Sweet v. Morrison*, 116 N. Y. 19.

§ 64. Decisions based on reports of others are valid.

It is not essential to the validity of a decision by an architect or engineer that it should be based upon first-hand information. The reports of assistants who have made a personal inspection may be relied upon, and in the absence of fraud or palpable mistake, a decision based upon such reports is binding upon the parties.

In *Jones v. City of New York*, 70 N. Y. Supp. 46, 60 A. D. 161, it was provided in the contract that the superintendent of schools was to decide all disputes as to the execution of the work and that his decision should be final. It was held that it was not necessary for the superintendent to act on first-hand information, but that he might act on reports received from subordinates who had inspected the property, and

that in the absence of fraud or mistake his decision based on such reports of subordinate inspectors was binding on the parties. *Sweet v. Morrison*, 116 N. Y. 19.

But such certificates may be successfully attacked, if there are no facts upon which such reports may be founded. *Wakefield Const. Co. v. City of New York*, 142 N. Y. Supp. 743, 157 A. D. 535.

§ 65. No hearing necessary.

It is not essential to the validity of the decision that the parties should be granted a hearing, or that the architect or engineer should take the testimony of witnesses.

“ His skill and experience as an architect has been relied upon by both parties to the contract to determine whether it has been fully and properly performed.” *Heidlinger v. Onward Const. Co.*, 90 N. Y. Supp. 115, 44 Misc. 555.

See also *Sweet v. Morrison*, 116 N. Y. 19. But see *McMahon v. N. Y. & Erie R. R.*, 20 N. Y. 463.

§ 66. Unreasonable refusal excuses production.

Where a contractor has substantially performed his contract, although he is bound to procure a certificate of performance, he may recover without obtaining such certificate upon showing the refusal of the arbitrator to give the certificate. Such refusal is unreasonable and excuses the production of the certificate. Of course, where a certificate is given showing substantial performance, or where the contractor is allowed to recover upon a substantial performance without the production of the certificate, the owner is allowed to offset against the contractor's claim for the

defects in performance. *Crouch v. Gutmann*, 134 N. Y. 45; *Nolan v. Whitney*, 88 N. Y. 649.

It accordingly follows that the same tests may be applied in determining whether the certificate is unreasonably refused as are applied in determining if a contract has been substantially performed. And the question is one of fact. *Wright v. Reusens*, 133 N. Y. 306.

See also "Substantial Performance," § 30.

But a determination that the refusal is unreasonable may be precluded, and the duty may be imposed upon the court of ruling as a matter of law that the refusal is not unreasonable. Thus where fifteen per cent. of the value of the work is not performed it cannot be said that the refusal is unreasonable. *Fuchs v. Saladino*, 118 N. Y. Supp. 172, 133 A. D. 710.

See *Flaherty v. Miner*, 123 N. Y. 382; *Thomas v. Fleury*, 26 N. Y. 26; *Highton v. Dessau*, 19 N. Y. Supp. 395; *MacKnight F. S. Co. v. Mayor of New York*, 160 N. Y. 72; *N. Y. & N. H. Automatic Sprinkler Co. v. Andrews*, 23 N. Y. Supp. 998, 4 Misc. 124, 70 N. Y. Supp. 798, 62 A. D. 8, 173 N. Y. 25; *Thomas v. Stewart*, 132 N. Y. 580; *Weeks v. O'Brien*, 141 N. Y. 199.

If the contract has been completed so that the certificate should be given, but its delivery is prevented by injunction or other infirmity, its non-production is excused. In *Bowery National Bank v. Mayor of New York*, 63 N. Y. 336, the court said:

"It would be unreasonable, that if the judgment of the umpire had pronounced the contract fully completed, his sudden physical infirmity (his insanity for example), or his death, disenabling him from putting his signature to a certificate to that effect, should deprive the contractor of a right of action, on

account of the non-production of it. The injunction order is like that—it is that. It has not prevented the assent of the skill and judgment of the water purveyor, that the contract has been fully completed. It only stays his hand from expressing in writing his conviction. A refusal from that cause is based upon something far apart from the non-performance by the contractor of his duty under the contract, far apart from the attainment by the municipality of the objects and benefits of the condition; something which is the act of a stranger to the contract, and should not affect the contractor, and hence is as to him and as to the contract and conditions, unreasonable.”

Likewise it was held in *Beecher v. Schuback*, 23 N. Y. Supp. 604, 4 Misc. 54, where the contract required the production of the architect’s certificate to entitle the contractor to the final payment. The court said:

“The answer is that the architect therein named was dead and that the condition is avoided. But another architect was substituted by the owner and accepted by the contractors, and in plain reason his certificate stood for that of his predecessor. In the absence of evidence that the certificate was fraudulently or unreasonably withheld, a recovery under the contract is inadmissible.”

A certificate must be based on reason not on a mere whim. *Connecticut Granite Mining Co. v. Trustees of Brooklyn Bridge*, 52 N. Y. Supp. 667, 32 A. D. 83, affirmed 159 N. Y. 543.

A refusal to give a material man a certificate upon the ground that one certificate has already been given to the owner is unreasonable and dispenses with the necessity of securing and producing such certificate. *Murdock v. Jones*, 3 A. D. 221, 38 N. Y. Supp. 461.

§ 67. Waiver of certificate.

The necessity of producing the certificate may be waived by the owner, provided his intention to so waive is made clear either expressly or by implication from his acts. Such intention may be expressed by payment of installments, *Fuchs v. Saladino*, 118 N. Y. Supp. 172, 133 A. D. 710, but the waiver will be only as to the installments paid, not as to all the future installments, *Gardner v. Clark*. 21 N. Y. 399; by acceptance of the work, *Smith v. Alker*, 102 N. Y. 87; by taking possession of an uncompleted building if the intent is made clear, *Duell v. McCraw*, 33 N. Y. Supp. 528, 86 Hun 331.

The production of the certificate of the designated arbitrator may be waived upon agreement express or implied to accept the certificate of a substitute. Such was the case in *McEntyre v. Tucker*, 31 N. Y. Supp. 672, 10 Misc. 669, where the court said:

“ It is not to be gainsaid that, by the terms of the contract, a certificate was a condition precedent to payment. Certificates were presented but they were signed, ‘ Geo. A. Freeman, Jr., by W. Holman Smith.’ Freeman was the architect and Smith his assistant; and respondent’s position is that the latter’s certificate was ineffectual to entitle plaintiff to payment. Upon the uncontradicted proof, these facts appear: That, to the knowledge and with the acquiescence of the defendant, Freeman substituted Smith for himself in the preparation of the specifications and the superintendence of the building; that Freeman was never on the premises, and never saw the work; that Freeman authorized Smith to issue certificates; that the defendant, after the contract, never met Freeman, and conducted all the business with Smith; that the extra work was planned and executed by Smith; that when

Smith proposed to furnish the final certificate, defendant made no objection to its issuance by him, but only solicited delay; that other certificates issued by Smith had been accepted and paid by defendant; and that, when the last installment was due, defendant accepted Smith's certificate from plaintiff, without objection, and promised to settle next week. Nor is this all. By the seventh paragraph of the contract, the plaintiff was required to permit any person appointed by the architect to inspect the work, plainly evincing that from the beginning, a substitute for Freeman was in the contemplation of the parties. That defendant could waive the condition of a certificate from Freeman, and accept instead a certificate from Smith, is of course an indisputable proposition of law. That he did so waive the provision for certificates from Freeman, and assent instead to certificates from Smith is the clear conclusion of reason and justice."

The failure of the contractor to produce the certificate is waived by the owner unless he raises the objection by his answer. *Hartley v. Murtha*, 39 N. Y. Supp. 212, 5 A. D. 408.

See § 533 of Code of Civil Procedure. *Smith v. Cary*, 145 N. Y. Supp. 99, 160 A. D. 119.

§ 68. Certificate excused when contractor ejected.

When the contract provides for payment upon a certificate showing completion of the work and also contains a clause allowing the owner to eject the contractor and complete the work at his expense, if the owner acts under the latter clause, the contractor need not produce the certificate of completion on an action for a balance due him on the contract price.

In *Weeks v. O'Brien*, 141 N. Y. 199, the court said:

"By so doing the provision requiring the archi-

teets's certificate was rendered inapplicable. The object of that provision is to furnish to the owner of the building, when called upon to pay the contract price of the work, authentic evidence that the work to be certified has been performed. When the owner himself proceeds under the contract to complete the work he needs no architect's certificate to apprise him whether the contractor has performed his contract. The owner does the work left undone by the contractor and the contract provides how, in that case, the expense shall be adjusted as between him and the contractor. It is to be deducted from the amount unpaid in the contract, and that amount the owner is assumed to know. Where the contractor in such case sues for any installment, it is open to the contractor to show how much he has expended in completing the work, and what allowances ought to be made for defective work, or any matter going in reduction of the claim made. The complaint was defective in omitting suitable allegations for this cause of action. But the plaintiff asked to go to the jury upon this ground, and the trial judge put the nonsuit exclusively upon the ground that the complaint failed to aver that a certificate was unreasonably refused. We think this issue as to the completion of the work by the defendant, having been opened by the counsel for the defendant, and it appearing from his evidence that no certificate was necessary to enable the plaintiff to recover the difference between the last installment and the amount expended by the defendant in completing the work, the complaint should not have been dismissed upon the ground upon which the motion was granted, but that the case should have gone to the jury upon the issue so litigated."

In *Smith v. Wetmore*, 167 N. Y. 234, the contract also contained a provision for the superseding of the

contractor on his default to perform diligently, and such a notice was given to the contractor, and the owner completed the contract.

It was held:

“ On an issue of performance it was competent for the contractor to prove if he could that the owner himself took the work out of his hands and assumed to complete it. In such a case when the contractor sues to recover the balance due to him on the contract he is not required to produce the certificate.”

It is sometimes provided that the architect is also to determine what balance, if any, is due the contractor after the completion by the owner. Such a certificate is only binding upon the contractor as proof of the extent of the owner's damage, where the owner serves notice upon the contractor ejecting him. Where the contractor abandons the work before the notice of termination has been served, the certificate is not admissible as conclusive proof of the amount of the owner's damage. *Charlton v. Scoville*, 144 N. Y. 691.

See also *Van Clief v. Van Vechten*, 130 N. Y. 571; *Beardsley v. Cook*, 143 N. Y. 143; *Ogden v. Alexander*, 140 N. Y. 356; *Bader v. City of New York*, 101 N. Y. Supp. 351, 51 Misc. 358; *Hall v. Long*, 68 N. Y. Supp. 522, 34 Misc. 1.

In such a case an architect's certificate is not requisite to entitle a sub-contractor to enforce a mechanic's lien for materials furnished by him and used in the building, where the owner has completed the work as provided by the contract, upon the contractor's failure to perform. *Campbell v. Coon*, 149 N. Y. 556.

§ 69. Performance prevented excuses.

Where the contract is broken by the owner and performance is prevented, the contractor suing for breach

of contract may recover without producing the certificate. See § 76.

§ 70. Whose certificate required.

Where an agreement is made to pay for work done and materials furnished, "under a certificate from the engineer in charge," the certificate of the engineer in charge at the time the work was done is intended and not that of the engineer in charge at the time of the making of the agreement. *Wangler v. Swift*, 90 N. Y. 38.

In *Reilly v. Lee*, 16 N. Y. Supp. 313, 61 Hun 627, the defendant had a contract with a railroad for the building of bridges, and sublet part to plaintiff to be performed to the satisfaction of and paid for on the certificate of the "engineer in charge." It was held that the "engineer in charge" meant the one who was to direct the method of doing the work, and it is to his satisfaction and acceptance that the work is to be done, and therefore it meant the man in charge of the entire work or the railroad's engineer, upon whose satisfaction and certificate the defendant's pay from the company depended. *McEntyre v. Tucker*, 31 N. Y. Supp. 672, 10 Misc. 669.

§ 71. Form of certificate.

No particular form of certificate is necessary unless the contract so requires. A notice in any form which will fairly and reasonably accomplish the purpose for which it is designed, will be held to be sufficient.

In *Stewart v. Keteltas*, 36 N. Y. 392, the court said:

"It was not necessary that the architect's certificate should contain a statement that the work was done agreeable to the drawings and specifications, within the time, in a good, workmanlike and substan-

tial manner, under his direction and to his satisfaction. The agreement of the defendant was, that the work should be so done, to be testified by a writing or certificate, under the hand of the architect, but the form of the certificate is not prescribed in that part of the contract which contains the obligations of the plaintiffs, and as the work was to be done in this manner, before they were entitled to demand any certificate from the architect, whose duty it was to withhold it until the work was so done, it may be assumed that a certificate signed by him, stating only that the work was done, would sufficiently testify to its having been performed in accordance with all of these requirements."

In *St. John's College v. Ætna Indemnity Co.*, 201 N. Y. 335, the contract provided that payments should be made "provided in each case a certificate shall be obtained from and signed by the architect." It was claimed that the certificates of the architect were not in proper form. They read as follows:

"This is to certify that John Maher & Son are entitled to the first payment as per contract for new building from St. John's College, Fordham, N. Y. City, \$8,000.00."

The defendant contended that the architect should have given the certificate in form setting forth the amount of the work done and materials furnished, showing in detail the basis for the certificate given, and that any certificate given without such detail did not comply with the contract.

The court said:

"The question now is simply whether the certificate given complied with the contract. It was undoubtedly necessary for the architect to act in good faith between the parties, and loyalty towards the owner required him to ascertain by reasonable computation or esti-

mate in advance of giving the certificate the amount of work done and materials furnished upon which to base such certificate pursuant to the contract."

"If either of the parties to the contract or the bond desired a certificate of the architect that should state in detail the work done and materials furnished as constituting work done within the terms of the contract the one desiring it should have insisted upon its being so stated in the contract or in the bond relating thereto."

In *Wyckoff v. Meyers*, 44 N. Y. 143, the following was held sufficient:

"This is to certify that the last payment of \$1800.00 is due W. & W. on your buildings on G. Street as per contract."

A certificate given in the form of a recommendation of payment has also been held sufficient. *Tilden v. Buffalo Office Bldg. Co.*, 50 N. Y. Supp. 511, 27 A. D. 510.

In the latter case it was also held that unless the owner based his refusal to pay upon the form of the certificate, and its failure to comply with the requirements of the contract, he waived his right to insist on that defense when sued on the contract.

See also *Snaith v. Smith*, 27 N. Y. Supp. 379, 7 Misc. 37; *Oberleis v. Bullinger*, 75 Hun 248, 27 N. Y. Supp. 19.

Where a written contract provides for work to be done subject to approval of a third person, evidence cannot be given to show that it was intended that the approval should be in writing. No demand for such approval is necessary. It is only necessary to show the approval, and this may be expressed or implied from the conduct of the party, and his failure to intimate any disapproval is sufficient to warrant an infer-

ence of approval. *Union Stove Works v. Arnoux*, 28 N. Y. Supp. 23, 7 Misc. 700.

See also *Wakefield Const. Co. v. City of New York*, 142 N. Y. Supp. 743, 157 A. D. 535.

§ 72. Excuse must be pleaded.

The plaintiff need not specifically set forth in the complaint that the required certificate has been obtained, where such certificate is required by the contract, but he may state generally that he has duly performed all the conditions on his part to be performed. Such an allegation will be held to refer not only to conditions to be performed by the plaintiff, but to conditions precedent to be performed by some one else. See *Smith v. Cary*, 145 N. Y. Supp. 99, 160 A. D. 119, and § 533, Code of Civil Procedure.

Where the production of the certificate is sought to be excused, or the validity of a certificate is attacked, the facts relied upon for that purpose must be pleaded or they cannot be proved.

In *Weeks v. O'Brien*, 141 N. Y. 199, the contract required a certificate as a condition to payment. The complaint did not state that the certificate had been obtained or that it had been unreasonably withheld. The court held that no recovery could be had.

In *Dwyer v. City of New York*, 79 N. Y. Supp. 17, 77 A. D. 224, the complaint proceeded upon the theory of complete performance by the plaintiff. The specifications in the contract provided that the architect's certificate was to be a condition precedent to the right of the plaintiff to recover payment for any part of the work. Upon the trial the plaintiff failed to show that the work was completed to the satisfaction of the architect and that the latter had furnished a certificate to that effect. The complaint con-

tained no allegation excusing the production of the certificate. Evidence was offered which tended to show complete performance and that the certificate had been unreasonably withheld by the architect. The court held:

“ The plaintiff was not entitled to recover on the theory of complete performance under this contract without the production of the architect’s certificate, unless he laid the foundation in his complaint for the evidence excusing compliance in this regard.”

See also *Granger v. B-K Iron Works*, 204 N. Y. 218; *Horan v. Mason*, 125 N. Y. Supp. 668, 141 A. D. 89; *Everard v. Mayor of New York*, 35 N. Y. Supp. 315, 89 Hun 425; *N. Y. Building Imp. Co. v. Springfield El. Pump Co.*, 67 N. Y. Supp. 887, 56 A. D. 294.

But where the contract provides expressly that the certificate shall not be final, the same may be attacked by the owner without pleading fraud, misconduct or mistake. The issuance of a certificate in such a case is only *prima facie* evidence of performance. Such a case was *Farrell v. Levy*, 124 N. Y. Supp. 439, 139 A. D. 790. The court there held:

“ There is, however, to be found no authority which holds that, where the parties have in express language provided that the certificate should not be conclusive as between them, there exists a rule of law which will override this matter of mutual contract. If this be so then the learned trial court was in error in refusing to permit the defendant to give evidence of non-performance on the part of the plaintiff, notwithstanding the issuance of the certificates in question. To hold that such certificates as these cannot be attacked by the defendant without an affirmative defense of fraud is to apply to them precisely the same rule as would have been applicable had the contract

provided that they should be conclusive. There certainly must be some difference between the effect of a contract which provides that a certificate shall be conclusive, and that of another contract which provides that a certificate shall not be conclusive. To hold otherwise is to give both absolutely contrary provisions the same legal effect. Doubtless the issuance of a certificate provided for in a contract, but which is declared not to be conclusive as between the parties, may furnish *prima facie* evidence of performance in support of an allegation in the complaint that the work was performed. Giving the certificate this force, there should be no obligation on the part of the defendant to set up an affirmative defense of non-performance in order to meet what the plaintiff was bound to prove as a part of his own case."

§ 73. Arbitration.

Formerly the courts showed a disposition to frown upon any attempt to withdraw controversies from their jurisdiction by agreements between the parties. And although arbitration as an expeditious method of settling disputes is now encouraged to a greater extent than formerly, the principle still prevails that an agreement which withdraws all controversies of the parties from the courts, and provides for an adjustment of all disputes by arbitration is void and will not stand in the way of a recovery. A provision, however, that no right of action shall accrue until a third person has performed specific acts or determined certain questions of difference as to amounts or values upon which the parties cannot agree, will be enforced. In other words agreements which oust the courts entirely from jurisdiction are not recognized as binding, but those which make the determination by an

arbitrator of certain questions arising under a contract a condition precedent to an action, are held to be enforceable, and no recovery will be permitted unless the award is proved or its absence satisfactorily accounted for upon grounds heretofore stated.

In the case of *National Cont. Co. v. Hudson River W. P. Co.*, 170 N. Y. 439, also 192 N. Y. 209, the court points out the distinction between executory agreements of arbitration which oust a court of jurisdiction and therefore are rejected as a bar, and those which are sustained as the sole remedy between the parties; citing *D. & H. Canal Co. v. Penn. Coal Co.*, 50 N. Y. 250, and quoting from *Seward v. City of Rochester*, 109 N. Y. 164, as follows:

“ In one class, it is said, ‘ the parties undertake by an independent agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that before a right of action shall accrue certain facts shall be determined or amounts or values ascertained, and this is made a condition precedent, either in terms or by necessary implication.’ ”

The provision of the contract in question read as follows:

“ To prevent all disputes and litigation it is further agreed by and between the parties to this contract that the engineer ——— or ——— or their successors, either or both of them, shall be referee in all cases to determine all the questions that may in any way arise under this contract, and to decide all questions which may arise relative to the fulfillment of this contract on the part of the contractor, and the findings, estimate and decision of such engineers or either of them shall be final and conclusive.”

The court held that this provision merely made the estimate of the engineer a prerequisite to an action

unless the certificate was unreasonably refused, saying: (192 N. Y. 221.)

“ That a provision in a contract which would withdraw all controversies of the parties relating thereto from the courts and submit them to arbitration will not be enforced, is settled by authority. (*Haggart v. Morgan; Seward v. City of Rochester.*)’”

It was likewise held in the case of *Wyckoff v. Woarms*, 103 N. Y. Supp. 650, 118 A. D. 699. There the contract provided that in case any alteration was required in the work, if the amount to be added to or deducted from the contract price could not be agreed upon, the same was to be decided by arbitrators selected by the parties. The court points out that this provision did not offend against the rule stated because the only question to be decided arose under the contract; the first being whether there is work added or omitted as appears from the drawings and specifications, and the second question being the reasonable value of the work added or omitted. The determination of these questions was a condition precedent to any right of recovery on the part of the plaintiff.

Arbitrators are not the exclusive judges of the extent of their powers. They must confine their decisions to the matters referred to them. *Halstead v. Seaman*, 82 N. Y. 27.

But “ if the arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law. If courts should assume to rejudge the decision of arbitrators upon the merits, the value of this method of settling controversies would be destroyed, and an award instead of being a final determination of a controversy would become but one of the steps in its progress.”

“ It must, as has been already observed, appear upon the face of the award that the arbitrators have mistaken the law, to enable the court to set aside the award on that ground. If it appear from the award that the arbitrators intended to decide the case according to the law, and the grounds for their decision are set out, which in law do not justify it, the case is brought within the exception to the general rule, and the court will set it aside.” *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 399.

See also *Hoffman v. DeGraaf*, 109 N. Y. 638; *Perkins v. Giles*, 50 N. Y. 228; *N. Y. Lumber and W. W. Co. v. Schneider*, 119 N. Y. 475; *Masury v. Whiton*, 111 N. Y. 679.

And a valid award is a bar to an action on the original claim. *Wiberly v. Matthews*, 91 N. Y. 648.

§ 74. Statutory arbitration.

There are also statutory provisions regulating arbitrations — § 2365 to § 2386, Code of Civil Procedure.

These provisions do not affect common-law arbitrations except as otherwise provided therein. *Hinkle v. Zimmerman*, 184 N. Y. 114; *N. Y. Lumber and W. W. Co. v. Schneider*, 119 N. Y. 475.

Under the provisions of the Code only those matters can be submitted to arbitration which may be the subject-matter of an action. Section 2365, Code. Thus appraisers of the value of real estate are not arbitrators, and their proceedings are not to be subjected to the provisions of the statute. *Wurster v. Armfield*, 67 A. D. 158, 73 N. Y. Supp. 609, 175 N. Y. 256; *Turner v. N. Y. C. R. R.*, 74 Misc. 524, 132 N. Y. Supp. 418.

The submission of a cause to arbitration is in legal effect a discontinuance of a pending action, even though the arbitrators refuse to act or the submission

is not acknowledged as required by the Code, since the submission would still be valid as a common-law arbitration under § 2386 of the Code. *McNulty v. Solley*, 95 N. Y. 242.

But some of the provisions of the Code apply to both common-law and statutory arbitrations. Such sections are § 2383 and § 2369. *Hinkle v. Zimmerman*, 184 N. Y. 114.

But if the submission is not acknowledged as required by § 2366, the court cannot award a judgment thereon and the award will not be confirmed. *Electrical Steel Elevator Co. v. Kam Malting Co.*, 112 A. D. 686, 98 N. Y. Supp. 604; *Smadbeck v. City of Mt. Vernon*, 124 A. D. 515, 109 N. Y. Supp. 70.

The agreement of submission must be executed and acknowledged with the formalities which would be necessary in the case of an acknowledgment of a deed to be recorded in this state; and the acknowledgment when taken before a notary public of another state must be authenticated by a proper certificate as in case of a deed. The statutory provisions in this respect cannot be waived. *Concrete Steel Co. v. Green*, 65 Misc. 210, 121 N. Y. Supp. 237.

The provisions of § 2369 of the Code requiring arbitrators to be sworn unless the oath is waived apply to both common-law and statutory arbitrations. Where it is sought to set aside the award because of a failure of the arbitrators to be sworn, if a waiver of the provisions requiring the oath is claimed, the waiver in order to be binding must be in writing. *Hinkle v. Zimmerman*, 184 N. Y. 114; *Flannery v. Sahagian*, 134 N. Y. 85.

After an award has been made by the arbitrators they have no power to rejudge the case and alter the

award. *Flannery v. Sahagian*, 134 N. Y. 85; *Herbst v. Hagenauers*, 137 N. Y. 290.

Where the parties to a dispute agree to submit the same to arbitration under the provisions of the Code, and an award is made thereon, such award can be attacked only in a case provided in §§ 2374 or 2375 of the Code, since under § 2373 the court must grant an order confirming the award unless it is vacated, modified or corrected, as prescribed in those two sections. And an arbitrator is authorized to award interest on the claim. *Matter of Burke*, 191 N. Y. 437, affirming 117 A. D. 479, 102 N. Y. Supp. 785.

But see *People ex rel. Cranford v. Wilcox*, 207 N. Y. 743.

The courts have no power to review except upon the grounds stated in §§ 2374 and 2375. *Matter of Wilkins*, 169 N. Y. 494, affirming 48 A. D. 433, 62 N. Y. Supp. 1068.

An award cannot be set aside on the merits of the controversy. *Dobson v. C. R. R. of N. J.*, 78 N. Y. Supp. 82, 38 Misc. 582.

And while the more regular course is for a party desiring to vacate, modify or correct a report to make an independent motion for that relief, the omission to make such a motion will not deprive the party of his right to raise the objections upon a motion made by the other party to confirm the report. *Matter of Pickner*, 130 A. D. 88, 114 N. Y. Supp. 289.

But the court cannot take any action whatever upon an award where the arbitration is not statutory. *Electrical Steel Elevator Co. v. Kam Malting Co.*, 112 A. D. 686, 98 N. Y. Supp. 604.

When an award does not appear upon its face to be definite and final, and does not in itself contain the data or means of working out a definite and final de-

termination of the whole controversy submitted, the powers conferred upon the arbitrators have not been fully executed and the provisions of the Code are imperative that it must be set aside. *Herbst v. Hagen-aers*, 137 N. Y. 290.

Where the merits of a controversy are referred to an arbitrator selected by the parties, his determination either as to the law or the facts is final and conclusive, and a court will not open an award unless perverse misconstruction or positive misconduct upon the part of the arbitrator is positively established, or there is some provision in the agreement of submission authorizing it. The award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. The only appeal allowed is from the action of the court, not from the action of the arbitrators. There is no appeal from the arbitrators' decision upon the merits. The only questions presented for review by an appeal are such as can be raised under §§ 2374 and 2375 of the Code, on a motion to confirm or vacate the award. *Matter of Wilkins*, 169 N. Y. 494; *Matter of Picker*, 130 A. D. 88, 114 N. Y. Supp. 289.

No appeal can be taken from an order confirming an award. The appeal must be taken from the judgment or the order vacating an award. *Matter of Gitt*, 138 A. D. 147, 123 N. Y. Supp. 304.

A submission can be revoked only by an instrument in writing made by one of the parties and delivered to the arbitrators. This applies to common-law as well as to statutory arbitrations. *Hinkle v. Zimmerman*, 184 N. Y. 114; *N. Y. Lumber and W. W. Co. v. Schneider*, 119 N. Y. 475.

A refusal by a defendant to select an arbitrator, the contract containing an arbitration clause, does not

justify the exclusion of affirmative evidence on its behalf upon the ground that before it could maintain a defense it must show compliance with such a clause as a condition precedent thereto. While the refusal to arbitrate might subject the defendant to an action for damages it cannot preclude the defendant from presenting any evidence pertinent and material to the issue joined by the pleadings. *Finucane v. Bd. of Education*, 190 N. Y. 77.

The right of a party to recover damages because of a revocation of an agreement to arbitrate is not necessarily controlled by § 2384 of the Code. Neither the right nor the remedy there given is exclusive. *Magoun v. Magoun*, 84 A. D. 232; *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633.

Arbitrators cannot sit on Sunday against the objection of one of the parties. *Matter of Picker*, 130 A. D. 88, 114 N. Y. Supp. 289.

Arbitrators may award costs of the proceeding. *N. Y. Lumber and W. W. Co. v. Schneider*, 119 N. Y. 475.

CHAPTER SIX.

EXTRA WORK AND SPECIFICATIONS.

§ 75. Extra work and breach of contract.

The terms extra work and additional work are commonly used interchangeably, although it has been sought to define and distinguish them. *Shields v. City of New York*, 82 N. Y. Supp. 1020, 84 A. D. 502. But distinction must be made, on the one hand, between claims made for extra or additional work which arise by a separate independent contract or under a modification of the original contract, and, on the other hand, claims for damages for breach of contract which are sometimes designated as claims for extra or additional work.

Where a provision is inserted in a contract that the contractor shall make no claim for extra or additional work unless the same has been done in pursuance of a written order of the owner or his representative, such clause is to be construed as referring to work which is concededly not called for by the contract. *Kelly v. St. Michael's Church*, 133 N. Y. Supp. 334, 148 A. D. 767; *Dwyer v. Mayor of New York*, 79 N. Y. Supp. 21, 77 A. D. 224.

But under such a clause no recovery can be made for extra work which is merely a modification of the original general plan and involves only changes in the matters covered by the specifications, unless the main contract is performed. But if the additional or extra work is done under a contract apart from and entirely distinct from the original contract, recovery may be had for the extra work in spite of the non-performance

of the original contract. In such a case there are two separate and distinct contracts, and non-performance of one cannot prevent recovery on the other if it is substantially performed. *Fox v. Fox*, 77 Misc. 100, 135 N. Y. Supp. 1073; *Mitchell v. Dunmore Realty Co.*, 141 N. Y. Supp. 89, 156 A. D. 117.

Such a provision cannot be nullified by the contractor bringing his action, which is in reality one for extra work, *i. e.*, work not called for by the contract, but arising under a subsidiary agreement, in the form of an action for breach of contract. But owing to divergent interpretations of the specifications on the part of the owner or his representative and the contractor, a dispute may arise as to whether or not certain work is required by the contract or is extra work. In such a case, should the owner or his representative demand the performance of certain work as under the contract, while the contractor correctly insisted that it should be classed as extra work, the contractor may continue to perform, and then recover the value of the extra work done as damages in an action for breach of the contract. But in cases where a municipality is a party to the contract, in order to prevent collusion between the contractor and the municipal representatives by which the contractor would be enabled to recover in violation of statute, on the theory of breach of contract for unauthorized work which was really extra work, the rule has been so limited that if the work which it is demanded that the contractor do is clearly without the specifications, he must refuse to proceed with the contract and sue at once on *quantum meruit* for the work done up to that time, or for breach of contract. If he proceeds with the contract he will not be permitted to recover under the contract for the additional work done. This rule is laid down in the

case of *Borough Construction Co. v. City of New York*, 200 N. Y. 149.

There the action was brought to recover the value of extra materials furnished, and extra labor done by the plaintiffs in constructing a sewer under contract with the city. The action was not brought on the theory of recovery under the contract for extra work and services, but on the theory that there had been a breach of contract by the defendant for which damages should be allowed, the damages being measured by the value of such extra material supplied and work done. The contract was a very large one and the chief engineer in charge was to determine all questions in relation to the work and execution of the same. The contract provided that a certain kind of cement should be used on that part of the sewer below high water mark and another kind on the parts above. The engineer demanded of the contractor that he should lay the entire sewer in the more expensive kind of cement. The court says:

“The next question is whether the respondent was required to furnish materials and do work which were not covered by its contract, for of course this claim lies at the bottom of its recovery. I think it was.”

“The disposition of these questions brings us to the main inquiry, whether a recovery may be allowed on the theory of a breach of contract chosen by the respondent because it was unjustifiably required to furnish these extra materials and do this extra work in spite of its protest.

“The learned counsel for the appellant with considerable insistence advances arguments applicable to an action brought to recover on contract for extra services and materials and leading to the conclusion that such recovery cannot be permitted because such

materials and work were not called for or authorized in the manner prescribed by the contract. Of course, on the premises formulated by counsel on this theory his conclusions are unimpeachable, but the answer to the entire argument is that this action does not rest on any claim for extra services or materials under the contract but on an alleged breach of the contract by the city and its representatives whereby the respondent has suffered damages, and the question is whether the action can be maintained on that line.

“ I regard it as settled that it may; that within certain limits a contractor who is ordered by the proper representatives of the municipality to furnish materials or do work as covered by his contract which the former thinks are not called for by such contract, may under protest do as directed and subsequently recover damages because he has been so required, even though it should turn out that the contractor was right and that the official had no right to call on him to furnish such materials and do such labor. Decisions of this court have so conclusively established the principle that under such circumstances the contractor may treat the conduct of the municipality acting through its representatives as a breach of contract and recover damages, that it is only necessary to summarize these without argument.”

The court further states that because of the danger of unjust claims being enforced against the city unless some restriction is placed upon the right of the contractor, and because actions might be brought which would theoretically be for breach of contract, but which would in reality be to recover for extra work which had not been properly authorized, that some limitation must be placed upon the rule, and lays down the following principle:

“ Where the municipal representative without col-

lusion and against the contractor's opposition requires the latter to do something as covered by his contract, and the question whether the thing required is embraced within the contract is fairly debatable, and its determination surrounded by doubt, the contractor may comply with the demand under protest, and subsequently recover damages even though it turns out that he was right and that the thing was not covered by his contract. On the other hand if the thing required is clearly beyond the limits of the contract then the contractor may not even under protest do it and subsequently recover damages."

Whether the determination of the question referred to is one of law or fact is not stated. It appears to be a question of law for the court.

See also *Gearty v. Mayor of New York*, 171 N. Y. 61; *Lentilhon v. City of New York*, 102 A. D. 548, 92 N. Y. Supp. 897, affirmed 185 N. Y. 549; *Beckwith v. City of New York*, 133 N. Y. Supp. 202, 148 A. D. 658; *Molloy v. Village of Briarcliff Manor*, 129 N. Y. Supp. 929, 145 A. D. 483; *Uvalde Asphalt Paving Co. v. City of New York*, 138 N. Y. Supp. 1029, 154 A. D. 112; *Ryan v. City of New York*, 143 N. Y. Supp. 974, 159 A. D. 105.

§ 76. Certificates not necessary.

Where the action can be brought on the theory of breach of contract to recover for the additional materials and labor, it is not necessary to produce the certificate of the engineer or architect as to performance, while where the action is brought upon the contract to recover for extra work, the certificate must be produced.

"If this were an action for extra work under the contract such a certificate would be necessary, but, as

already pointed out, this is an action to recover damages for a breach of the contract, and the provision requiring a certificate is not applicable." *Gearty v. Mayor of New York*, 171 N. Y. 61; *Molloy v. Village of Briarcliff Manor*, 129 N. Y. Supp. 929, 145 A. D. 483.

§ 77. Work incident to the contract.

No recovery can be had by the contractor as for extras where the claim is founded upon the performance of work which, although unanticipated by the contractor, is within the contract, and an incident to its performance. That the contract develops to be more difficult and expensive than was anticipated, will not of itself justify a demand for increased compensation. The contractor is bound by the terms of his contract. He need not accept its terms unless he wants to, but having done so he must abide by his agreement. *Paladino v. Mayor of New York*, 10 N. Y. Supp. 66, 56 Hun 565, affirmed 125 N. Y. 733; *Murphy v. No. 1 Wall St. Corporation*, 127 N. Y. Supp. 735, 142 A. D. 835.

Thus, in the case of *Lentilhon v. City of New York*, 92 N. Y. Supp. 897, 102 A. D. 548, affirmed 185 N. Y. 549, the contract was for the removal of the walls of an old reservoir and excavating for the foundation for a building. The work was to be done according to specifications which referred to a plan showing a drain running from the bottom of the reservoir, but the contract required excavation below the drain, and it was necessary for the contractor to pump out surface water below the drain. The contractor was not entitled to recover for the pumping, though the specifications did not require it. The court said:

"The pumping was incident to the work. I do not understand that the city was interested in the ques-

tion of pumping so far as the same was performed by the plaintiff. The evidence indicates that it was for his own convenience in the performance of the work which he undertook. The other contract had been let and of course he was not entitled to rely upon any other contractor doing the work for him. There was no misrepresentation with respect to the sufficiency of the outlet. It is not pretended that the plan in that regard was inaccurate either as to size or location of the outlet or sewer in 42nd street into which it emptied. The outlet was open and unobstructed, and it drained the water to the level of its bottom. In this respect the case is distinguished from *Horgan v. Mayor.*"

So it is held where the contract itself gives notice of the possibility of changes in the plan being made necessary by developments and knowledge gained by reason of the prosecution of the work. Such changes of themselves will not justify a demand for increased compensation over the fixed rate of compensation. They are incident to the contract, and must be contemplated by the contractor at the time he makes his bid. In the case of *Peterson v. City of New York*, 205 N. Y. 323, it was provided that it was impossible to estimate in advance the quantities of the various kinds of work necessary and the materials to be supplied as most of the work was underground. It was also provided that if the rock was found to be unsatisfactory, the tunnel might be started at a lower elevation or at any other grade that the engineer might designate.

The engineer directed the shaft to be excavated 161 feet deeper than was specified, in order to find suitable rock in which to construct the tunnel. The contractor sued for damages for extra work, as the deeper excavation made its carrying on more expensive. It was held that no recovery could be had, as the work was

but the carrying out of the contract and not extra work. It was included in and provided for by the contract, citing *O'Brien v. Mayor*, 139 N. Y. 543.

But as to another portion of claim, plaintiff was permitted to recover. He was first ordered to line the shaft with iron and he purchased the iron. Thereafter the order was countermanded. It was held that he was entitled to recover such damages as he might be able to show he had sustained by reason of such violation of his rights under the contract.

But where the extra work is made necessary by reason of the acts of the other party, or a change in the conditions under which the work is to be done, brought about by the other party, the contractor may recover.

In the case of *Thilemann v. City of New York*, 81 N. Y. Supp. 773, 82 A. D. 136, the plaintiff entered into a contract for the construction of a city sewer. At about the same time contracts were awarded by the city for the regulating and grading of the streets in which the sewer was to be constructed. The contractors engaged in regulating and grading began their work before the plaintiff, who notified the city to prevent such contractors from filling in the streets for the reason that it would be necessary for him to re-excavate if they did so. The plaintiff sued for the value of extra work which it was necessary for him to do in removing the filling which had been so placed by the other contractors. It was held that he could recover. When the plaintiff first looked over the job prior to his estimate, the work of regulating and grading had not been commenced. The contract provided that should delay be occasioned by the other contractors on the line of work no claim for damages would be made, nor would any claim be made because

the street was not in the condition contemplated at the time of the making of the contract, except that if the plaintiff was delayed allowances would be made to him for such delay, and that all incumbrances and obstructions should be removed by the contractor at his own expense if so directed by the city engineer. It was held that the filling which it was necessary for the plaintiff to remove was not in the nature of "an incumbrance or obstruction" nor "a change of condition" within the contract, and therefore the city was liable. The court held:

"By its own act in permitting the other contractors to proceed with grading and regulating the very streets and avenues in which the plaintiff was directed to construct his sewer in accordance with the condition of the locality as it originally was, the city increased the plaintiff's work, and for the additional cost it should respond in damages. Although not obliged to wait until he had constructed his sewer in those avenues, it should, after directing against his protest such work to be done, reimburse him for the expense thereby entailed upon him." Citing *Rodgers v. City of New York*, 76 N. Y. Supp. 1029, 71 A. D. 618.

In the case of *Leahy v. City of New York*, 192 N. Y. 46, reversing 101 N. Y. Supp. 936, 116 A. D. 442, the court says:

"It is apparent from the reading of these provisions of the contract that it became the duty of the plaintiff to take care of and pump out of his trench all surface water entering the same, together with the flow from all existing sewers, drains and natural watercourses interrupted in his work, and that he was to bear all loss or damage arising out of unforeseen or unusual obstructions or difficulties which may be encountered, or from the action of the elements. But was it his

duty to take care of and provide for the flow of the water from the new lateral sewers which were contracted for and constructed after the plaintiff had entered into his contract with the city? None of the provisions of the contract to which attention has been called specifically referred to the flow of water from such sewers. Ordinarily in the construction of a trunk sewer the work proceeds from the mouth of the sewer up through the rising territory to be drained, and therefore, as soon as the lower portion is completed lateral sewers may be intersected and then the flow therefrom naturally proceeds through the finished portion of the trunk sewer to the place of its discharge without causing damage, delay or extra work, but the intersecting of lateral sewers and the discharge of their contents into the trench of the uncompleted trunk sewer must, of necessity, cause additional labor and expense in taking care of such flow. Under the express provisions of the contract the plaintiff did undertake to take care of the flow from the existing sewers, drains and natural watercourses; but we think it was not within the contemplation of the parties to the contract, nor a reasonable inference to be drawn from its provisions, that he was also to take care of the flow of the water collected in the new lateral sewers contracted for and constructed after he had entered into his contract for the construction of the trunk sewer; and that the city had no right to subject him to such additional expense and labor."

But a claim for damages for extra work, caused by the insertion of a provision in the contract in pursuance of a statute which is later declared to be unconstitutional, will not be allowed. Thus, where a state contract provided that no laborer, except in case of emergency, should be permitted or required to work more than eight hours a day, as required by the labor law,

and that law was thereafter held unconstitutional, but the contractor complied with such contract provision, it was held that the contractor was not entitled to extra compensation because he could have done the work cheaper by working his men longer hours. *Sundstrom v. State*, 144 N. Y. Supp. 390, 159 A. D. 241.

See also *Dunn v. City of New York*, 205 N. Y. 342, reversing 126 N. Y. Supp. 61, 141 A. D. 280; *Horgan v. Mayor of New York*, 160 N. Y. 516.

§ 78. Extra work caused by delay.

Where the extra work would have been avoided had the contractor completed his contract within the time stipulated for performance, no recovery can be had. *Kelly v. City of New York*, 94 N. Y. Supp. 872, 106 A. D. 576.

It is so stated also in the case of *Leahy v. City of New York*, 101 N. Y. Supp. 936, 116 A. D. 442, reversed 192 N. Y. 46.

§ 79. Examination before bidding.

Where a gross bid is called for, founded upon estimates of the amount of the proposed work necessary, which estimates are stated to be approximate, no recovery can be had as for extra work caused by the inaccuracy of the estimates. In *Sullivan v. Trustees of the Village of Sing Sing*, 122 N. Y. 389, the plaintiff agreed to build a bridge and make the necessary excavations at a fixed price per unit for each kind of work specified. An estimate of the necessary work to be done was given in the proposals, for the purpose of bidding only, and it was stated that the trustees were not to be bound by them. The estimate proved to be very inaccurate and plaintiff claimed that by reason of the additional and lower excavating made necessary, that he was entitled to extra compensation.

The court held otherwise, and said:

“ It seems that a reasonable construction requires the holding that all work of a general character provided for in the specifications, even though the amount of it may have been considerably in excess of the estimated quantities, comes within the work to be done at the contract prices.”

See also *Howard Iron Works Co. v. Pittsburg Steel Const. Co.*, 128 N. Y. Supp. 89, 143 A. D. 734; *Lentilhon v. City of New York*, 92 N. Y. Supp. 897, 102 A. D. 548, affirmed 185 N. Y. 549.

Where an opportunity is given the bidder to make an examination of the site of the work in order that he may thereby satisfy himself as to its nature, and as to the accuracy of the plans and specifications, no recovery can be had for extra work, unless the actual conditions do not coincide with the represented conditions to such an extent that the owner is responsible for the resulting deception of the contractor. The misrepresentation must be such that the contractor is unable to discover it upon the examination permitted. *City of New York v. Palladino*, 131 N. Y. Supp. 807, 146 A. D. 850.

In *Cunningham v. City of New York*, 79 N. Y. Supp. 401, 39 Misc. 197, the contractors entered into a written contract with the city for the building of a sewer and agreed to prosecute the work from as many different points and at such times as the city might determine, and to keep the work free from water at their own expense. They had full opportunity to examine its location. The court decided that they could not after the completion of the work and payment therefor, recover for extra work upon the ground that they had relied upon the plan of the work furnished by the city, which falsely indicated another sewer as then

existing, and that if the other sewer indicated had in fact existed, they could have drained the water from their work into such sewer and saved the cost of pumping.

In the case of *Riley v. City of Brooklyn*, 46 N. Y. 444, the plaintiff contracted to furnish material and grade and pave a street "agreeable to the profile of said street on file in the office of the street commissioner, and to keep the same in order for one year. After the work was done the street sank about eleven feet and the defendant refused to pay the plaintiff unless he filled up the depression. The profile exhibited the proposed changes, but the amount of filling and excavation was a matter of calculation. The court decided that the plaintiff could not recover until he had performed the work.

"The character of the soil, etc., were as well known to the plaintiff as to the defendant, and were open to his examination and survey, and the map and profile which were the basis of the contract disclosed upon its face the existence of the swamp which it is now claimed required the excess of earth to fill."

"The plaintiff expressly agreed with full knowledge or the means of knowledge of all the facts at his command to grade and pave the avenue over and across the swamp and to keep it in repair for one year, after its completion."

But the contractor is not bound as to matters which an examination will not disclose to be different than represented, so that the contractor is entitled to rely upon the representations made in submitting his bid. In *Horgan v. Mayor of New York*, 160 N. Y. 516, the plaintiff contracted with the defendant to clear, drain and concrete a park lake. The contract provided that the contractor should drain off the water from the

bottom of the lake during progress of the work, furnish all pumping necessary for the proper prosecution of the work, and that he should satisfy himself as to the nature and amount of work to be done by a personal examination of the location.

There was an outlet pipe in the bottom of the lake only the gate of which was visible upon the contractor's examination. But on his attempting to drain off the water thereby, the sewer itself proved to be obstructed, and failed to drain below a certain depth. The contractor was therefore compelled to pump out the water and claimed damages for such extra work. It was held that the contract did not contemplate the contractor's pumping out the water in that sense, but that he could properly assume that the water could be discharged through the outlet which the city had constructed for that purpose. And he was entitled to recover as for extra work the cost of pumping necessitated by the failure of the city to have the outlet pipe in working order, since it was impossible for the contractor to tell by an examination whether or not the outlet pipe was in working order.

The city was liable because it failed in the agreement which could be implied from the specifications that it would maintain an outlet at the bottom of the pond, and the contractor was damaged to the extent that he was required to do work which the contract did not contemplate.

In *Dunn v. City of New York*, 205 N. Y. 342, reversing 141 A. D. 280, 126 N. Y. Supp. 61, the court denied a recovery to the contractor for extra work made necessary in excavating rock on a street repaving job. The excavating was necessary in order to perform the contract, but it would not have been necessary had a former contractor who originally paved the street properly performed the first contract. The court said:

“ If in this case we should, as we probably must, assume that the contractor was deceived by appearances, that is to say, by the appearance of the roadway and by his comparisons of the old plans on file relating to the prior grading contracts, with those of the contracts he was to estimate upon, he has but himself to blame. He had the opportunity to physically examine the location of the work to be done and if that called for extensive tests, by way of borings and soundings, that fact, however troublesome, was one he must take into consideration.”

“ The contracts defined the obligations of the city and the respondent points to none which it has failed to perform. The contractor has suffered what loss resulted from the necessity to excavate rock, by reason of his reliance upon misleading appearances, rather than upon what a careful physical examination of the roadways would reveal. No representations of the city officers misled him.”

In a dissenting opinion in the Appellate Division, it was said:

“ There is presented the rather unusual case of a person having made a contract with the city which because of a misapprehension on his part as to the extent of the work to be done has involved him in a loss; and the courts have, I think, no right to give to a contractor who has made a mistake in making a contract an additional payment for work he has agreed to do, when that money must come out of the public treasury and ultimately must be supplied by taxation. The plaintiff knew perfectly well the obligations that he had assumed. He entered into his contract upon an assumption not based upon anything that the city or none of its officers said or did, but upon his examination of the work that he had to do and because that assumption turned out to be incorrect is no

justification for imposing upon the city an additional burden from that provided for in the contract itself."

See also *Atlantic Gulf Co. v. Woodmere Realty Co.*, 156 A. D. 351, 142 N. Y. Supp. 953; *Sundstrom v. State*, 144 N. Y. Supp. 390, 159 A. D. 241.

§ 80. Unforeseen obstacles provided against.

Even where the contract contains a provision that all damage arising from any unforeseen obstacle shall be assumed by the contractor, he may still recover for extra work made necessary because of a misrepresentation. But it must first be determined that the work for which payment is sought does not come within the contract.

In the case of *Horgan v. Mayor of New York*, 160 N. Y. 516, the contract also provided:

"All loss or damage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same or from the action of the elements or from incumbrances on the line of the work or from any act or omission on the part of the contractor or any person or agent employed by him not authorized by this agreement shall be sustained by the contractor."

It was held that this provision applied to the work to be done and to the unforeseen obstructions or difficulties which might be encountered, under the contract, and therefore did not affect the claim for extra work to which the contractor was subjected by reason of the unforeseen obstruction in the outlet pipe, such obstruction being entirely outside the contract.

See "Unforeseen Contingencies," § 39.

§ 81. No examination permitted.

But if no examination is permitted, the bidder in making his bid may rely upon such representations as are made in the plans or specifications for the purpose of showing that something exists which will facilitate and render less expensive the performance of the work. *Lentilhon v. City of New York*, 92 N. Y. Supp. 897, 102 A. D. 548, affirmed 185 N. Y. 549.

A recovery may be had for the damages caused if such representation should turn out to be erroneous. In *Langley v. Rouss*, 185 N. Y. 201, the court held:

“Where the amount of work to be performed and materials to be furnished under and by a contract depend upon conditions that cannot be ascertained by inspection and bidders are not required and given an opportunity to make such investigations as are necessary to satisfy themselves as to the amount of work to be done and materials to be furnished, and the contract, plans and specifications include representations as to existing conditions which are inserted for the purpose of enabling contractors to determine what bid to make for the proposed work and materials, a recovery may be had as for a breach of contract for the damages caused if it shall turn out that the representations were erroneous.”

Likewise it is held if plans are offered for the examination of the prospective bidder which are apparently sufficient to enable him to compute his bid, and thereafter the plans are altered so as to make the prosecution of the work more expensive.

In *Beckwith v. City of New York*, 148 A. D. 658, 133 N. Y. Supp. 202, the court said:

“So long as a prospective bidder applies at the office to which he was directed to apply for an inspection of the plan, and is there shown a plan which,

read in connection with the specifications, sufficiently describes the work to be done, and is given no hint or suggestion that there are other more detailed plans in existence, he is in our opinion justified in submitting a bid based upon the specifications which he has received and the plan which he has been shown.

This is what plaintiff did and there probably never would have been any question about the work to be performed, were it not for the fact that the more detailed plans differed from the specifications and called for a more expensive method of construction."

See also *Thilemann v. City of New York*, 81 N. Y. Supp. 773, 82 A. D. 136.

The bidder may rely upon representations contained in the specifications as to the character of the work. Thus the statement, "the pipe line is mostly and the tunnels are entirely to be in soft shale rock," is a warranty as to the quality of the excavation. *Delafield v. Village of Westfield*, 28 N. Y. Supp. 440, 77 Hun 124.

§ 82. Written orders for extra work.

Where the contract contained a provision that no claim shall be made by the contractor for additional work done unless the same be in pursuance of the written order of the owner, such a provision is to be construed as referring to work which is concededly not called for by the contract. *Kelly v. St. Michael's Church*, 133 N. Y. Supp. 334, 148 A. D. 733; *Dwyer v. Mayor of New York*, 79 N. Y. Supp. 21, 77 A. D. 224. And such a provision may be waived, or the conduct of the owner may be such as to estop him from contending that no recovery may be had, notwithstanding the failure to produce such written orders. *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369;

Kelly v. St. Michael's Church, 148 A. D. 733, 133 N. Y. Supp. 328; *Greenberg v. Mendelson*, 97 N. Y. Supp. 965, 49 Misc. 485.

But there must be a waiver as to each particular transaction, in order to permit the contractor to recover without the written order. It was so held in *Walsh v. Howard & Childs*, 113 N. Y. Supp. 499, 61 Misc. 328, where the court said:

"Even assuming that the contract provision was waived in the three previous transactions shown by the plaintiffs, the waiver in each case would apply to the particular case only, since each related to an independent transaction. The defendant was at liberty to insist on strict compliance with the contract as to any future transactions of a similar nature, as was held in *Gardner v. Clark*, 21 N. Y. 399. It may be that the defendant's manager misled plaintiffs into doing this extra work by promising to accept their proposal in the form and manner required by the contract as some of the testimony suggests, but damages on that account may not be recovered in this suit."

It is, however, well settled that, while the owner may waive the necessity of producing the written order, yet if a contract provides that extra work shall be performed only upon the written order of the architect or engineer, the latter have no authority to waive such requirements. *Langley v. Rouss*, 185 N. Y. 201; *Woodruff v. Rochester & Pittsburg R. R. Co.*, 108 N. Y. 39; *McGratty v. Haberman*, 127 A. D. 199, 111 N. Y. Supp. 48; *Molloy v. Village of Briarcliff Manor*, 129 N. Y. Supp. 929, 145 A. D. 483; *Traitel Marble Co. v. Brown Bros., Inc.*, 144 N. Y. Supp. 562, 159 A. D. 485.

On the subject of extra work when caused by errors of the owner or his agents, see *Mulholland v. Mayor of New York*, 113 N. Y. 631; *Becker v. City of New York*,

170 N. Y. 219, reversing 63 A. D. 615, 176 N. Y. 441, modifying 77 A. D. 635, 78 N. Y. Supp. 1064.

§ 83. Limitations in case of municipal contracts.

The limitations upon the authority of municipal officers to order additional work have already been noted. See "Capacity to Contract," § 1.

Where no such limitation exists, and the officers have authority to order extra work, the same rules apply as in the case of private contracts. *Fleming v. Village of Suspension Bridge*, 92 N. Y. 368.

Under § 419, New York Charter, the head of department awarding the contract may insert a provision authorizing an expenditure of an amount not exceeding five per centum of the contract price for extra work, for the purpose of completing the contract. Section 85 of the City Ordinances, limiting the borough presidents to an expenditure of \$1,000.00, is contradictory. The charter would prevail in case of a conflict. *City of New York v. Seely-Taylor Co.*, 133 N. Y. Supp. 808, 149 A. D. 98.

As to municipal contracts, see also Chapter One.

§ 84. Right to alter specifications.

A provision which is commonly found in specifications is to the effect that the owner reserves the right to make such changes as may be advisable or necessary in the plans and specifications covering the work; that the contract shall not be invalidated thereby; and that no claim shall be made by the contractor for any loss of profits because of any of such changes.

In interpreting such a provision to determine the rights of the parties, consideration must be given to the following:

First. — The circumstances surrounding the execu-

tion of the contract and the question whether all details of the work could have been specified at the time of the execution of the contract.

Second. — The object to be accomplished by the work; whether it is to result in the construction of a thing complete in itself, or whether it is a part of a larger work, so that the changes may be made necessary by circumstances extraneous to the work immediately at hand.

Third. — The reason for the change; whether the alteration is made merely for the purpose of saving expense.

In the last analysis, however, the question of what constitutes a reasonable change is one which must in each instance be left to the court, considering the facts and surrounding circumstances in the light of the decisions cited.

One of the earliest cases involving the interpretation of such a clause was *McMaster v. State of New York*, 108 N. Y. 542, where there was a provision to the effect that the state reserved the right to make any change deemed proper in the plans and specifications and the work was to be performed by the plaintiff unless such changes should increase the expense of doing the work, in which case the plaintiff was to be paid a reasonable compensation as certified to by the architect. The buildings were to be built of sandstone. After several of the buildings had been built the state resolved to construct the remaining buildings of brick and sandstone and finally the plaintiffs were ordered off the work entirely. The court, in speaking of this provision, says:

“ It authorizes such changes as frequently occur in the process of constructing buildings, in matters of taste, arrangement and details; but it does not au-

thorize a change in the general character of the building. If it does, a contract carefully entered into can be mainly if not entirely frustrated."

In the case of *National Contracting Co. v. Hudson River Water Power Co.*, 192 N. Y. 209, reversing 118 A. D. 665, 103 N. Y. Supp. 641, the court says that the question is one of degree. The owner cannot alter or destroy the essential identity of the thing contracted for. There the contract called for the construction of a masonry dam. The owner sought to change the structure from a masonry dam to an earth dam with a masonry core. Such a change required 380,000 cubic yards of earth embankment when none was called for by the original contract, and no unit price was fixed for that kind of work. The masonry work was reduced from 119,000 cubic yards to 42,000 cubic yards. The only reason for the change was to save expense; it was not essential. The court decided that the change was a substantial one and not within the owner's rights under the contract, saying:

"Under the contract the plaintiff did not become obligated to furnish labor and materials for the prosecution of any work or the construction of any structure the defendant might designate. It agreed to furnish such labor and materials as might be necessary for the construction of a particular thing, to wit, a dam. It could not, under the contract, have been required to build an aqueduct, a bridge, a courthouse or a railroad. Its obligation was not only confined to the construction of a dam, but to the construction of a particular kind of dam, to wit, a masonry dam. The provision that the dam was to be of masonry was as essential an element of the identity of the structure as was the provision that it was to be a dam. The circumstances attendant the preparation and execution of the contract clearly established this."

Several cases of considerable magnitude have arisen in connection with the state canal construction work which illustrate the rule as applied by the courts in the case of large public contracts, where the work is distributed over a considerable area and parcelled out among a number of contractors.

In the case of *Kinser Construction Co. v. State*, 204 N. Y. 381, affirming 145 A. D. 21, 129 N. Y. Supp. 567, also 125 N. Y. Supp. 46, 69 Misc. 78, the change in plans became necessary because the condition of the soil made the prosecution of the work impossible at the places planned, and not because it was cheaper or better. The court decided that the change was proper and the plaintiff was not entitled to damages for breach of contract or for prospective profits. The court distinguished the case from that of *National Contracting Co. v. Hudson River Water Power Co.*, saying:

“ The case cited involved a contract, not with the state, but between private parties, to build a single dam, while the contract in question covers but a small part of a great work. There was no provision for a change in case of necessity although there was power to make alterations without liability for anticipated profits. A change from a masonry dam with no earth called for, to a dam essentially of earth with comparatively little masonry, made for no reason but to save expenses, was held to destroy the essential identity of the thing contracted for and to constitute a breach of the contract. There the change was made under a power reserved of narrower scope and simply because the change would make construction cheaper, but here it was made not because it was cheaper, but because it was absolutely necessary, as otherwise the canal could not have been constructed at the point involved. There, also, the contractor was to be paid

in bonds secured by a mortgage on the structure itself, and if the change proved a failure the value of the bonds would be impaired.”

The court also cites and distinguishes *McMaster v. State of New York*, 108 N. Y. 542, and relies on *Kingsley v. City of Brooklyn*, 78 N. Y. 200.

In the case of *Ferguson Contracting Co. v. State*, 126 N. Y. Supp. 808, 70 Misc. 402, in sustaining the right of the state to make the alteration in the plans, the Court of Claims said:

“ In interpreting the clause of the contract relating to alterations, the nature of the work must be considered, its connection with other contracts providing for the construction of an extensive system of canals, and all the facts and circumstances connected with the work. *Woodruff v. Woodruff*, 52 N. Y. 53. The clause should not be construed as similar clauses are construed in contracts, wherein all the details can be specified. In a contract of this magnitude the state cannot anticipate all of the natural conditions that may arise when the work is undertaken or perfect its plans and specifications in every detail. Greater latitude must be allowed in contracts of the extent of this one, and the language is broad enough, under the circumstances, to permit of all necessary changes. The changes which have been made appear to have been required for a complete and perfect construction of the work, and come within the clause of the contract authorizing alterations to be made by the state. *Williams v. Chicago S. F. & C. Ry. Co.*, 153 Mo. 487, 54 S. W. 689; *Smith v. Sanitary District of Chicago*, 108 Ill. App. 69; *Reiss v. Scharner*, 87 Ill. App. 84; *Kingsley v. City of Brooklyn*, 78 N. Y. 200.

“ The word ‘ necessary ’ as used in the clause, in the contract relating to alterations, must be construed

in connection with the contract and the general improvement of which the contract formed a part. The work in process of construction by the state was a barge canal improvement of great extent of which the contract in this case formed a small section. The relation of this contract to the entire improvement is like that of a contract for a portion of a building to the construction of the entire building. A clause in a contract for only a portion of the entire improvement must be construed in the light of the whole work. Its construction is not to be limited to the particular contract in which the clause is to be found, since changes may be required because of the necessities of other parts of the work."

See also *People ex rel. Graves v. Sohmer*, 207 N. Y. 450; *People ex rel. Ford Co. v. Lewis*, 145 N. Y. Supp. 862, 159 A. D. 612.

§ 85. Conflicting specifications. Interpretation.

The rule for the interpretation of contracts is to give effect to every part of them, if possible.

"The meaning of a contract is to be gathered from a consideration of all its provisions and the inferences naturally derivable therefrom, as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance." *Horgan v. Mayor of New York*, 160 N. Y. 546.

See also *Dunn v. City of New York*, 205 N. Y. 342, 141 A. D. 280, 126 N. Y. Supp. 61; *Ferguson Contracting Co. v. State*, 126 N. Y. Supp. 808, 70 Misc. 402, and authorities cited; *Dunning v. County of Orange*, 139 A. D. 249, 124 N. Y. Supp. 107; *Isaacs v. Dawson*, 70 A. D. 232, 75 N. Y. Supp. 337; *Raymond Concrete Pile Co. v. John Thatcher & Son*, 143 N. Y. Supp. 959, 158 A. D. 546; *Atlantic Gulf Co. v. Woodmere Realty Co.*, 142 N. Y. Supp. 953, 156 A. D. 351.

Thus, in *Fuchs v. Saladino*, 118 N. Y. Supp. 172, 133 A. D. 710, it was held that where the one specification called for French glass in the front windows, and another provided that all glass to be used in windows should be the best American cylinder glass, the two provisions should be construed together so as to require the use of American glass in all except the front windows.

In *FitzGerald v. Moran*, 19 N. Y. Supp. 958, 65 Hun 621, one specification provided for walls to be plastered with King cement under direction of the superintendent of King & Co., and a second specification provided that cement and sand should be used in equal proportions. It was claimed that the first specification controlled, and that the assent of King's superintendent would authorize the use of less proportion of cement in the mixture than called for by the specifications. The court says:

“The rule in interpretation of contracts is to give effect to every part of them if practical. There is no necessary inconsistency between the two specifications; full effect can be given to each. The plastering — that is the laying of plaster on the walls — was to be subject to the direction of the superintendent, but the ingredients of the plaster and the proportions were to be those provided for in the contract. It cannot be supposed that these were to be subject to modification of the superintendent because on the proportion of the ingredients of the plaster the cost and value of the work largely depended.”

§ 86. Contract and plan.

Where there is a written contract and a plan, if there is a discrepancy between the two, the former controls. Thus, in *Dean v. Mayor of New York*, 167 N. Y. 13, it was held:

“ As the contract was clear it should govern and the plan and specifications should be regarded as subsidiary thereto and as intended to show the grade to which it was intended to bring the street, either by filling in or by excavation, and to provide a guide in the prosecution of the work. As the figures of estimates for the work to be done and for the materials to be furnished were approximate only, it was not a controlling circumstance that they were inaccurate as to the extent of ground to be covered or that there was no complete plan furnished. The prices were fixed for each cubic yard of filling or excavation and that was sufficient for the plaintiff whose risk it was if a complete plan was not furnished for the whole extent of the street.” “ The contract expressed and was intended to express the agreement of the parties to it, and measured the extent of their several obligations; while the plan in accordance with which the contractor agreed to complete the work was the chart by which he was to be guided in its performance.”

§ 87. Plans and specifications annexed.

Where a contract provides that the work shall conform to “ the plans and specifications, a copy of which is hereto annexed,” the actual annexation of the plans and specifications is not a condition upon which the validity of the agreement depends.

“ If annexed the identification might be more satisfactory, but without that the contents of the plans and specifications, so far as referred to in the agreement executed, became constructively a part of it, and in that respect made one instrument.” *New England Iron Co. v. Gilbert E. R. R. Co.*, 91 N. Y. 153.

So “ hereto annexed ” may be interpreted as “ herein specified ” or “ herein referred to.” *Cook v. Allen*, 67 N. Y. 579.

Where parties entered into a contract for work to be done according to specifications to be verified by the signatures of the parties, and to be considered as part of the contract, and the specifications were not signed because the plaintiff said it was unnecessary, it was held that they were as much a part of the contract as if signed, and that the plaintiff was bound to do the work according to the specifications as if they had been verified. *Lennon v. Smith*, 1 N. Y. 97, 14 Daly 520.

See also *N. J. Boiler Co. v. Concord Const. Co.*, 99 N. Y. Supp. 316; *Millstone Granite Co. v. Dolan*, 18 N. Y. Supp. 791, 61 N. Y. Supp. 106.

§ 88. Specifications silent.

Where the specifications are silent as to any particular requirement, it need not be supplied unless it is understood in the trade that it is necessary even though it is not mentioned.

“ The contract is silent as to whether there were to be gates on the car (elevator) or not. It merely called for a combination passenger and freight car. If appellant had desired gates to it she should have provided for it in her specifications. There is no proof in the case that when they are not specified the understanding in the trade is that they should be supplied, nor is there any proof that such car is incomplete without gates.” *Horgan v. McKenzie*, 17 N. Y. Supp. 174.

§ 89. General. Words and phrases.

Architects' fees.

Custom allows architects a fee of 5% of the total cost of the building, 3½% for plans and 1½% for supervision. *Rinn v. Electric Power Co.*, 38 N. Y. Supp. 345, 3 A. D. 305.

Appurtenances.

“An appurtenance is a ‘ thing used with and related to or dependent upon another thing more worthy and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant; a thing belonging to another thing as principal and which passes as incident to the principal.’ An appurtenant to a dredge must be something incident and needful in the work of dredging. With such work plaintiff’s suction pump had nothing whatever to do, and the actual effect of putting it on the dredge Big Jim was to prevent its use for dredging purposes during the time they were connected.” *Gullman v. Sharp*, 30 N. Y. Supp. 1036, 81 Hun 462.

Best capacity.

In *Horgan v. McKenzie*, 17 N. Y. Supp. 174, the specifications required the plaintiff to furnish an “Otto Gas Engine of best capacity to run the elevator,” but no rate of speed was specified. Where the engine put in was perfect and it was shown that such a size was used in running elevators, a finding for defendant on an action for breach of contract was not disturbed.

Bricklaying; masonry; payment “per thousand.”

In an action on a contract to lay brick at a fixed price “a thousand,” evidence of a well-known custom prevalent in the business and in the locality is admissible to show that a thousand is estimated according to the cubic feet of masonry of laid brick and one-half the openings in the building rather than by actual count. *Brunold v. Glasser*, 53 N. Y. Supp. 1021, 25 Misc. 285.

Chasing.

Chasing is a technical term, and relates to the cutting of brick in a building for wiring. *Foster v. Phi Gamma Delta Club*, 120 N. Y. Supp. 809.

Completed.

In *Delafield v. Village of Westfield*, 28 N. Y. Supp. 440, 77 Hun 124, it was provided that a payment of 90% should be made of all work "completed" up to the first day of the month. The word "completed" was interpreted to mean not entirely completed, but the contractor was held to be entitled to an estimate of and payment for any work of which a material and substantial part had been performed or completed.

Demolition of building.

In a contract for the demolition of a building, which is silent as to whom the old building is to belong, the custom is that the old material belongs to the contractor. *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128.

See also *Hood v. Whitwell*, 120 N. Y. Supp. 372, 66 Misc. 49.

Detail drawings.

Where an owner is required to furnish "all detail drawings," the words mean a plan, not a "shop drawing and punching sheets," from which the iron work may be manufactured. *N. Y. Architectural T. C. Co. v. Williams*, 92 N. Y. Supp. 809, 102 A. D. 1.

Embankment.

See *Mechanic's Bank v. City of New York*, 135 N. Y. Supp. 978, 151 A. D. 87.

Excavating.

In *Hillwig v. Blumenberg*, 7 N. Y. Supp. 746, 55 Hun 605, the words "all excavating" were interpreted as not necessarily including blasting.

See *Dunn v. City of New York*, 205 N. Y. at page 351, where the court says:

"It might be assumed that ordinarily a 'regulating and paving agreement' in the absence of provisions for grading technically does not contemplate rock excavation between the lines of sub-grade and surface grade, of a graded street, but the assumption is inefficacious where the actual agreement is so framed as to cover all contingencies which may arise in preparing a roadbed as specified. However rigorous these agreements, they are not unjust and they were optional."

Flagging; paving.

"Flagging is one species of pavement, to wit, a paving with flat stone, and is more peculiarly adapted and generally used in paving the sidewalks, or that part of the street set apart for the use of pedestrians, and, perhaps, it may be suitable in some cases for carriageways, but wherever used it is a pavement, and a relaying of flags is a repaving of the portion of the street so reflagged. To pave is to cover with stones or brick, or other suitable material, so as to make a level or convenient surface for horses, carriages, or foot passengers, and a sidewalk is paved when it is laid or flagged with flat stones as well as when paved with brick, as is frequently done. If the laying of a sidewalk or footway with brick would be a paving, or if done a second time a repaving, and it would certainly come within the ordinary signification of that term, then a relaying the same surface with flat stones would

be well designated under the general term as a pavement." In the *Matter of Phillips*, 60 N. Y. 16 (at pages 21 and 22).

Free from knots.

In *Rush v. Wagner*, 12 N. Y. Supp. 2, the words "all flooring to be laid smooth and level and free from knots" were interpreted to mean entirely free from knots and not substantially so. It was held to be a question for the jury whether a violation of this provision was a trivial or material violation of the contract.

Necessary.

See *Ferguson Contracting Co. v. State*, 126 N. Y. Supp. 808, 70 Misc. 472.

Partitions.

The term "partitions" does not include cellar partitions subdividing the cellar to make coal boxes. *Tibbitts v. Phipps*, 51 N. Y. Supp. 954, 30 A. D. 274.

Percentage of cost.

In *Boller v. City of New York*, 102 N. Y. Supp. 729, 117 A. D. 458, the plaintiff agreed to furnish plans and working drawings with specifications, prepare the same for public letting and supervise the construction of a viaduct. The city was to pay him 5% of the total cost of the construction of the viaduct. The work was done by the contractors to whom the contract was let and they were paid \$116,298.00 and plaintiff was paid 5% thereof, and receipted to the city in full. Subsequently the contractors recovered a judgment against the city for breach of the contract, in so far as the city had failed to permit them to prosecute the work

as provided for in the contract and that the delay thereby resulting had damaged them to the extent of \$53,000.00. The judgment was paid by the city and the plaintiffs then made a claim for an additional payment of 5% of the amount thereof. The court held that the parties had in contemplation the payment of 5% on the cost of construction. The fact that the city broke its contract for which the contractor was awarded damages, did not make the damages a part of the cost of construction any more than would a recovery against the city for personal injuries be a part of such cost. Furthermore, the judgment of the contractors was not based on the contract but on a breach of it, which was not part of the cost of construction, and therefore the plaintiffs were not entitled to recover.

Where a contract provides that the contractor shall receive as compensation the cost of labor and material used in the work "and 10% added thereto as profit," the amounts paid by the contractor or sub-contractors for various portions of the work, including the customary profits of the sub-contractors, will be considered as "the cost of labor and material" in estimating the amount due to the contractor. In *Hamilton v. Coogan*, 28 N. Y. Supp. 21, 7 Misc. 677, the court says:

"What is a reasonable construction of the contract must be gathered from the circumstances of the case, the work to be done, and the usages of business as known to both parties. This was a contract for the taking down of an old structure, excavating for a new one, and erecting a large and costly building, which required the co-operation of a number of different trades, and the whole work was to be completed within a comparatively short period. The custom of apportioning building work among persons engaged in the several trades was known to and recognized by de-

fendants, and is so generally understood that, unless the contrary appears, we must consider that the parties entered into this contract with the understanding that that course was to be pursued."

See also *Westinghouse, C., & K. Co. v. Long Island R. Co.*, 145 N. Y. Supp. 201, 160 A. D. 200.

Plastering.

See *Walls v. Bailey*, 49 N. Y. 464.

Plumbing.

What is and is not "plumbing" is a question of fact, and expert testimony should be admitted to decide the question. *Gitlin v. Stone*, 126 N. Y. Supp. 88; *Cassidy v. Fontham*, 14 N. Y. Supp. 151.

Sash and trim.

See *Smith v. Collins*, 12 N. Y. Supp. 53.

Strikes.

See *D. L. & W. R. R. v. Bowns*, 58 N. Y. 573; also § 39.

Trade name.

Where a contract calls for an article by its trade name, if there is an article of commerce known by that name, and it is furnished, it is a sufficient compliance with the contract. *Pollock v. Penn. Iron Works Co.*, 34 N. Y. Supp. 129, 13 Misc. 194, affirmed 157 N. Y. 699.

Water tight.

In *Sherwood v. Houtman*, 26 N. Y. Supp. 150, 73 Hun 544, the words "water tight" floor in a stable

were held to mean absolutely water tight, where the floor was over another room used as a carriage room.

Workmanlike manner.

See *Miller v. Winters*, 144 N. Y. Supp. 351.

See also *Gilmour Mfg. Co. v. Cornell*, 57 N. Y. Supp. 81, 26 Misc. 752; *Cronin v. Tebo*, 24 N. Y. Supp. 644, 71 Hun 59.

See § 58, end of section, *re* “Time.”

CHAPTER SEVEN.

PAYMENT AND DAMAGES.

§ 90. The following provisions from the New York Charter should be noted as bearing upon the topics to be here discussed:

“Board of aldermen; further restrictions.

§ 418. It shall not be lawful for the board of aldermen to release any contractor with the city or with any of the departments, boards, bureaus or officers thereof, from any fine or penalty incurred under his contract, save upon the unanimous recommendation of the board of estimate and apportionment. And it shall not be lawful for the board of aldermen to extend the time for the performance of any such contract save upon the unanimous recommendation of the board of estimate and apportionment.”

“Certificate of completion to be filed.

§ 421. It shall be the duty of any borough president, or head of any department having in charge any work, within five days after the acceptance of such work, to file with the comptroller a final certificate of the completion and acceptance thereof, signed by the chief engineer or head of his department. The filing of such certificate shall be presumptive evidence that such work has been completed according to contract.” . . .

“Comptroller to pay contractors.

§ 422. When a contract for a public improvement shall have been entered into and a certified copy thereof shall have been filed with the comptroller, in conformity with section four hundred and nineteen of this act, said comptroller is hereby authorized and directed to pay to the contractor or his assigns, from time to time as the work progresses, eighty-five percentum of the estimated value of the work actually done under said contract, until the same shall have been completed. The estimate of the value of any such work shall be signed by the surveyor and also by the chief engineer of the department having the matter in charge, and upon the final completion of any contract, and filing of the certificate of completion, the comptroller shall within thirty days thereafter, or within thirty days after the expiration of the time within which, according to the terms of the contract, the city has to accept such work, pay to the contractor or his assigns, the balance of the

amount due under said contract, provided, however, that the board of aldermen, upon the recommendation of the board of estimate and apportionment, may authorize contracts for asphalt or other pavement to be made, with a guaranty upon the part of the contractor for one or more years, with a provision for the retention of a percentage of the amount to be paid, which shall be paid within thirty days after the expiration of the guaranty, upon the filing of a certificate signed by the chief engineer of the department having the matter in charge that the terms of the contract have been complied with. The payments to be made by the comptroller pursuant to this section shall be made out of the 'street improvement fund,' if the cost and expense of said work are to be assessed in whole or in part upon property deemed to be benefited thereby.

The amounts collected from any and all assessments for local improvement paid out of such fund, together with all defaults and interest on the same, are to be paid into said fund. It shall be the duty of, and lawful for the comptroller, when thereto authorized by the board of estimate and apportionment, to create and issue such additional amounts of the corporate stock of the city of New York as shall be necessary to provide for the cost and expense of such work, or such part thereof as is to be borne and paid by The City of New York; and the proceeds of the sale of such stock shall be paid into the street improvement fund."

"Jurisdiction of actions against the city.

§ 262. All actions wherein The City of New York is made a party defendant shall be tried in that county within the City of New York in which the cause of action arose, or in the county of New York, subject to the power of the court to change the place of trial in the cases provided by law."

"Service of process.

§ 263. All process and papers for the commencement of actions and legal proceedings against The City of New York shall be served either upon the mayor, the comptroller or the corporation counsel."

"Issuance of execution.

§ 264. No execution shall be issued upon any judgment recovered against the City of New York until after ten days' notice, in writing, of the recovery of such judgment shall have been given to the comptroller."

Attention is directed to the following Ordinances of the City of New York.

§ 518. "In all contracts for work for the City of New York where provision is made for the payment of the contract price by installments,

a provision shall be inserted that the contractor shall allow ten per cent. of the contract price of the work actually done to remain as security till the whole work shall be completed according to the contract."

§ 521. "Whenever any contract shall be made hereafter by any of the departments or officers of the City of New York the amount whereof is to be afterward collected by assessment from the property benefited by the work to be done under said contract, it shall be the duty of the head of department or officers aforesaid making such contracts to cause to be inserted therein a clause that as the work progresses payments will be made to the contractors by monthly installments of seventy per cent. on the work performed provided the amount of work done on each installment shall amount to \$1500 and the head of department making such contracts shall forthwith file a copy thereof with the comptroller."

§ 522. "Whenever any payment shall become due upon any contract, according to the provisions thereof, or in accordance with any of the provisions of these ordinances, it shall be the duty of the head of department or officer aforesaid having such work in charge to furnish to the person entitled to such payments a certificate, in writing, specifying the contract upon which such payment is due and the amount due upon such contract."

§ 523. "It shall be the duty of the comptroller on the presentation of such certificate being made to him, to pay the amount thereof and endorse such payment upon the contract upon which said payment is made; but no payment shall be made upon such contract beyond the amount thereof, and the final payment thereon shall not be made until the head of department or officer aforesaid having such work in charge shall furnish the comptroller, who shall file the same in his office, a certificate, signed by the head of such department, or officer aforesaid, that the work mentioned in such contract has been completed according to the terms of said contract, and to the satisfaction of the head of department giving such certificate."

§ 525. "Each and every contractor shall be required to have an affidavit from the surveyor setting forth the amount of work done, of every description, that may be charged in each bill or assessment list of said contract; and said affidavit shall be attached to said assessment list. The inspector shall also furnish an affidavit attached to each contract that the work is done according to the plans and specifications, said affidavit to be attached to each assessment list before presented for confirmation."

§ 526. "In all cases of delinquency in the payment of any assessment for work done under a contract made by any contractor with The City of New York in respect to any street or road, and in respect to the building of wharves, piers, slips and sewers in this city, and in all such like contracts on a final settlement with every such contractor, there shall be allowed and paid to such contractor, interest money which shall have been collected on his account or contract, first deducting the

collector's commission on so much of the said interest as shall have been collected and received by him."

§ 527. "In all contracts for work done at the expense of and by The City of New York for the more speedy execution of any by-laws, ordinances, orders or directions of The City of New York, and which by any law The City of New York is authorized to collect by assessment or otherwise from the owners or occupants, lessees or parties interested in any property deemed benefited thereby provision shall be made for the payment of the amount of said contract, on the completion of the work, to the satisfaction of the department making such contract."

§ 528. "It shall be lawful for the department making any contract of the character mentioned in the preceding section of this article to make provision for the payment to any contractor of installments on account of such work, as the same progresses, reserving thirty per cent. of the contract price of work actually done, to remain as security till the whole work be completed according to the contract."

§ 91. Payment by mandamus.

Mandamus although not the usual proceeding for the collection of a debt, may sometimes be used to compel the payment of the amount due under a public contract. Where there exists no dispute as to the performance of the contract, and it appears upon the law and the facts that there cannot be any defense to the claim, and where the funds for payment are available and all that remains to be done is the drawing and delivery of the warrant, the court may in its discretion issue a writ directing payment.

The general rule is laid down in the case of *People ex rel. Beck v. Coler*, 54 N. Y. Supp. 639, 34 A. D. 167, as follows:

"The first claim of the appellants is that the relator's remedy is by action, and not by mandamus. The rule that a mandamus will not be granted where the party has a remedy by action is one addressed to the sound discretion of the court, and is not of universal application. Thus, in *Matter of Freel*, 148 N. Y. 165, 42 N. E. 586, the comptroller of the city of Brooklyn was required by a writ of peremptory man-

damus to approve the relator's claim for work and material furnished under a contract with the city for the construction of a reservoir, and to make and sign a warrant for its payment. There was no question in that case but that the relator might have sued the city for the claim in an action at law. In *People v. Schieren*, 89 Hun 220, 35 N. Y. Supp. 61, a writ of mandamus was issued against the comptroller and auditor to examine the relator's claim for gas furnished under a contract with the city, and to certify the value thereof. Undoubtedly, also, in this case an action on the claim would lie. We are of the opinion that where the right of a party to payment from the city is clear, and there are funds on hand applicable to such payment, the court may and will, in the exercise of a sound discretion, compel by mandamus a ministerial officer to audit and pay the claim, though, if the city itself repudiated or denied the existence of the obligation, the rule would be different. In the present case money for the construction of the school house was raised by the issue of bonds of the school district, and the proceeds were paid to the comptroller before the time of the relator's application. The relator therefor made out a *prima facie* case, and was entitled to the writ, unless the affidavits on behalf of the comptroller and auditor showed sufficient cause to the contrary."

The court held that the comptroller cannot defeat the issuance of the writ upon an affidavit to the effect that the undertaking of the improvement was unwise, unless some allegation of fraud is made. Likewise, where the performance of a contract had been certified to by the supervising engineer and the comptroller had drawn his warrant but refused to deliver it because the relator had violated provisions of the Labor

Law, which made the contract voidable but not void, there being no dispute about the proper performance of the work, the writ was issued.

“The duty enjoined upon the comptroller the performance of which is commanded by the writ, was ministerial.” *People ex rel. Rodgers v. Coler*, 67 N. Y. Supp. 701, 56 A. D. 98, affirmed 166 N. Y. 1.

The comptroller has no judicial powers. *Matter of Freel*, 148 N. Y. 165. But if it appears from the answering affidavits in positive terms, that there exists a fair ground of contest over the performance of the contract or the amount due thereunder, the writ will be refused. In *People ex rel. Rolf v. Coler*, 68 N. Y. Supp. 448, 58 A. D. 131, the plaintiff produced the certificate of the engineer showing performance. But the contract provided that it was not fully binding on the city. The opposing papers showed that the work had not been properly done, that unsound timber had been used—that the work had not been performed according to the specifications. The court held that since the mandamus is directed to the discretion of the court, the plaintiff should be relegated to his action at law.

See also *People ex rel. Lentilhon v. Coler*, 70 N. Y. Supp. 482, 61 A. D. 223; *People ex rel. Cranford v. Coler*, 26 Misc. 509, 57 N. Y. Supp. 461; *People ex rel. Pennell v. Treanor*, 44 N. Y. Supp. 528, 15 A. D. 508; *Vacheron v. City of New York*, 34 Misc. 420, 69 N. Y. Supp. 608.

A misappropriation of funds will not defeat the issuance of the writ. In *People ex rel. Rohr v. Owens*, 110 A. D. 30, 96 N. Y. Supp. 1054, a draft was given to the relator in payment of certain work which he had done. The amount thereof was raised by tax levy and came into the hands of the treasurer of the village. When

demand for payment was made on his successor in office, the contention was made that the first treasurer had misappropriated the funds. The court decided that as the money was raised for a specific purpose, the law regards it as still in the treasury, and capable of being applied on the payment of the draft and therefore a writ should issue.

In *People ex rel. Dannat v. Comptroller*, 77 N. Y. at page 50, the court said:

“ It is a general rule that the writ of mandamus will not be awarded when it appears that there are no funds out of which the warrant can be paid if drawn. But when money has been appropriated for a specific purpose, it is not in all cases a sufficient answer to an application for a mandamus to compel its payment for that purpose, to set up that the money has been wrongfully applied to other purposes. It may be regarded in contemplation of law as still in the treasury. *People v. Stout*, 23 Barb. 338; *Hohl v. Town of Westford*, 33 Wis. 324; *Campbell v. Polk*, 3 Iowa, 476; *Lansing v. Van Gorder*, 24 Misc. 465; *Risley v. Smith*, 64 N. Y. 576.”

And a proceeding against a municipal officer for the enforcement of a right of a relator against the municipality does not abate by the resignation, removal or expiration of the term of the officer, but may be enforced against his successor or successors. *People ex rel. La Chicotte v. Best*, 187 N. Y. 1.

See also *People ex rel. Cranford v. Willcox*, 138 N. Y. Supp. 1055, 153 A. D. 759, affirmed 207 N. Y. 743.

§ 92. Special provisions for payment.

A municipality cannot be sued for breach of contract until it is in default. Where a particular method of discharging the obligations of the contract has been

provided for, that method must be pursued. Collection cannot be made in any other manner unless the municipality has by its own acts made it impossible to pursue the prescribed course. It is sometimes provided that the contractor is not to be paid until the assessments levied by the municipality to pay for the improvement have been paid. If the officials are dilatory in levying or collecting the assessment, the contractor has no cause of action against the city for breach of contract. His remedy is to apply first for a writ of mandamus to compel them to levy and collect the assessment. Thus, in *People ex rel. Ready v. Mayor*, 144 N. Y. 63, the contract provided that no payment should be made to the relator "until the cost of said work shall have been ascertained, and assessed upon and collected from the tax payers liable to local taxation upon the same." The assessment was made and part of the money collected but nothing further was done. A writ was granted directing the officials to complete their duties of collecting the money due upon the assessment.

But if the officials have made it impossible for the assessment to be collected, their action amounts to a breach of the contract, and action may be brought by the contractor at once. This distinction between the two cases is pointed out in *Weston v. City of Syracuse*, 158 N. Y. 275. At page 284 the court says:

"If he finds, as in the case of *Ready v. Mayor*, that the city has not proceeded with reasonable diligence to collect the assessment and turn over the proceeds to him, he may and should proceed by mandamus to compel such action on its part. But where a municipality disables itself from performing the contract by such action on its part as makes void, and therefore uncollectible, an assessment, for the purpose of providing

compensation, or refuses to perform the contract on its part, as in *Reilly v. City of Albany* (112 N. Y. 30), then an action against the city for damages, sustained by reason of its failure to perform the contract on its part, may be maintained.

It has been suggested that the two cases last referred to are in conflict, but they are not. The *Ready* case points out that prior to the breach of the contract by the municipality the contractor's remedy is to apply for a mandamus to hasten municipal action in the absence of due diligence; while the *Reilly* case with equal clearness marks out the path to be pursued by the contractor, where the other party, to wit, the municipality, either designedly or accidentally puts itself in a position where it will not or cannot perform the contract on its part. In such case the remedy is against the city for breach of the contract."

See also *Reilly v. City of Albany*, 112 N. Y. 30; *Hunt v. City of Utica*, 18 N. Y. 442; *Kronsbein v. City of Rochester*, 76 A. D. 494, 78 N. Y. Supp. 813; *Harrison v. Village of New Brighton*, 97 N. Y. Supp. 246, 110 A. D. 267.

The distinction must be kept in mind between a provision of law that prescribes how a creditor of a municipality may obtain payment of his claim, and one which simply provides the method by which the municipality or those acting for it are authorized to obtain funds with which to pay the claim.

In *Davidson v. Village of White Plains*, 197 N. Y. 266 (reversing 121 A. D. 287, 105 N. Y. Supp. 803), in discussing these two provisions, the court says:

"In the *Dannat* case (*Dannat v. Mayor*, 66 N. Y. 585), the contract was made not with the corporation but with the board of education, which discharged the governmental function of providing public instruction.

Under the statutory scheme the board of education was to deliver to the creditor its draft on the comptroller, who was required to pay the same if there were funds to the credit of the board sufficient for the purpose. It was held that the action of the comptroller, if a draft were presented, was merely ministerial and could be enforced by mandamus, and that he was not required to act until the draft was procured. In the *Swift* case (*Swift v. Mayor*, 83 N. Y. 528), the contract was not that of the city, but of the board of police, which had its own treasurer, to whom all the funds to be disbursed by the department were paid by the city officers. In neither of these cases was there any general obligation upon the city to discharge obligations incurred by the contracts made by those boards. The case before us is different. The water commissioners, under the statute, are directed to acquire the necessary lands and easements in the name and in behalf of the village and all the revenues derived from the supply of water are paid to the village. That the relation of principal and agent existed between the commissioners and the village seems clear under the authorities. (*Fleming v. Village of Suspension Bridge*, 92 N. Y. 368; *Walsh v. Mayor, etc., New York*, 107 N. Y. 220.) There is no prescribed limit to the amount which commissioners are authorized to expend. The liability of the village for the obligations incurred by the commissioners is general and unlimited."

The other kind of case is represented by *Holroyd v. Town of Indian Lake*, 180 N. Y. 318. At page 324 the opinion reads:

"No action at law will lie against the town because the contract is not made by the town and is not for its benefit. The duty of the town board and the town officers is simply to raise the money in the manner

specified and pay it over to the commissioners upon whom is placed the duty of constructing the plant and managing it after its construction. If, after the contract has been made by the water commissioners, they fail to notify the town board of the amount required to discharge the obligation, they can be compelled by mandamus to do so. If, upon the receipt of the notice, the town board fails to issue the bonds and raise the money, mandamus will lie to compel it to act in accordance with the requirements of the statute. So, when the time is ripe for an action on the part of any officer of the town or district and he refuses to act, he can be compelled to act by a writ of mandamus. A right of review by writ of certiorari is provided in case he acts, but does not act in accordance with the law. The remedy of the plaintiffs is not by an action at law against the town, but by one or more special proceedings as the case may require to compel the action required by the statute. A town, as we have seen, cannot be sued except for an obligation of the town, and the contract set forth in the complaint is not such an obligation. If a judgment could be recovered against the town upon that contract it would be collected through taxes levied upon the taxable property of the town at large, whereas the statute requires that the cost of the water plant shall be paid through taxes levied upon the property in the water district only."

See also *Richardson v. City of Mt. Vernon*, 138 N. Y. Supp. 703, 154 A. D. 71.

§ 93. Notice before suit.

It is a common provision of law that no action may be commenced against a municipality until after the presentation of a demand upon its financial officer. The particular statute applicable must be examined

in each case, as the provisions vary. The New York Charter provides as follows:

"Presentation of claims to be pleaded.

§ 261. No action or special proceeding for any cause whatever shall be prosecuted or maintained against the city of New York, unless it shall appear by and as an allegation in the complaint or necessary moving papers that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the comptroller of said city for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment; and in the case of claims against said city, accruing after the passage of this act, for damages for injuries to real or personal property, or for the destruction thereof, alleged to have been sustained by reason of the negligence of, or by the creation or maintenance of a nuisance by, said city, or any department, board, officer, agent or employee thereof, no action thereon shall be maintained against said city unless such action shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of the intention to commence such action and of the time when and place where the damages were incurred or sustained, together with a verified statement showing in detail the property alleged to have been damaged or destroyed, and the value thereof, shall have been filed with the comptroller of said city within six months after such cause of action shall have accrued."

The interpretation of these statutes has been the subject of an abundance of litigation. Many of the cases cited were negligence actions. But the principles deduced therefrom are applicable equally to statutes similar to that quoted. All statutes are not as clear as § 261, above. As to actions against counties, see *N. Y. Catholic Protective v. Rockland Co.*, 144 N. Y. Supp. 552, 159 A. D. 455.

§ 94. Compliance is condition precedent.

Where such notice is required to be served, compliance with the statute is a condition precedent to the action. The effect of the statute is not to suspend the operation of the statute of limitations until after the

notice is served. *McCarthy v. City of New York*, 146 N. Y. Supp. 281. The time fixed by the statute of limitations is increased by the addition of the time of the notice required to be given before the action is commenced. Where the statute requires that a certain time must elapse after the filing of the claim, before the action may be brought, the complaint must allege that such time has elapsed. If a complaint is defective in this respect it need not be demurred to, but advantage may be taken of the defect at any time. Such a prohibition against bringing an action is not a defense, but forbids the bringing of any action until the preliminary requirements have been complied with. The pleadings will not be examined to determine whether or not the necessary time has expired. It must be alleged and proved. *Trall v. Village of Cuba*, 84 N. Y. Supp. 661, 88 A. D. 410.

In *Reining v. City of Buffalo*, 102 N. Y. 308, it was said:

“ A provision of defendant's charter requiring that ‘ No action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the common council in the manner and form provided,’ absolutely forbids the prosecution of any action until the proper demand has been made. It attaches to all actions whatsoever, and by force of the statute becomes an essential part of the cause of action, to be alleged and proved as any other material fact. It is competent for the legislature to attach a condition to the maintenance of a common-law action as well as one created by statute.”

See also *Borst v. Town of Sharon*, 48 N. Y. Supp. 996, 24 A. D. 599.

§ 95. Substantial compliance necessary.

Such statutes are to be strictly construed and substantial compliance with the provisions thereof will be enforced. Thus, since the object of the statutes is to provide an opportunity to examine the claim, to pass upon the amount and determine the justice of it, the notice must be a reasonably definite statement of the basis of the claim. And where the claim was for personal injuries resulting from a defect in a street a mile long, the notice which did not designate any particular place on the street, was insufficient.

“ The statute before us, reasonably construed, does not require those things to be stated with literal nicety or exactness, but it does require such a statement as will enable the municipal authorities to locate the place and fix the time of the accident. When a notice contains the information necessary for that purpose, it is a substantial compliance with the statute, but when it falls short of that test it is insufficient.” *Purdy v. City of New York*, 193 N. Y. 521.

In *Johnson v. City of Troy*, 48 N. Y. Supp. 998, 24 A. D. 602, the statute required that the notice should state the claimant's residence by street and number. The house in which the plaintiff lived was not numbered, and, therefore, it was impossible for him to comply with the statute in that respect. But he also failed to state the name of the street upon which he resided and the court held that to be a fatal defect.

In *Sheehy v. City of New York*, 160 N. Y. 140, reversing 51 N. Y. Supp. 519, 29 A. D. 263, the plaintiff filed with the corporation counsel, through her attorney, a statement which set forth that she made a claim for damages for personal injuries, but did not clearly state her intention to commence an action, as required by statute. The lower court held that the statute had

to be strictly construed and that the failure to set forth clearly the intention to commence the action was a fatal defect.

Evidence had been offered on the trial to show that the corporation counsel upon receipt of the notice entered the same in a book which was kept for filing notices of intention to commence actions. The court excluded this evidence which would have proven that the corporation counsel regarded the notice as sufficient. The court holds that the notice was sufficient, saying:

“ While in an action like this the statute must be substantially complied with or the plaintiff cannot recover, still where an effort has been made and the notice served, and such is construed to accomplish the object of the statute, it should be regarded as sufficient.”

In *Missano v. Mayor of New York*, 160 N. Y. 123, where the notice of intention to sue should have been filed with the corporation counsel but was filed with the comptroller, who forwarded it to the corporation counsel, the notice was upheld as sufficient. The court said:

“ The statute neither prescribes a form of notice nor by whom the notice shall be filed, and while its proper construction might require that the notice be given to the party commencing the action, its provisions are not so rigid as to invalidate the notice if actually received by the corporation counsel, because received by him through another official with whom it was mistakenly filed by the parties.”

This case is distinguished from *Gates v. State*, 128 N. Y. 221, where a notice was sent by mail. The jurisdiction of the board of claims depended upon its receipt. There was no presumption of the receipt of the claim because it was sent through the mail.

See also *Weinstein v. City of New York*, 141 N. Y. Supp. 732, 156 A. D. 541.

§ 96. Verbal notice.

Verbal notice of intention to sue, accompanied by a statement of claim, is insufficient. *De Vore v. City of Auburn*, 71 N. Y. Supp. 747, 64 A. D. 84.

§ 97. Officials cannot waive.

The requirements of the statute as to notice cannot be waived by the municipal officials. A retention of a notice which is insufficient, and an investigation of the claim mentioned therein, does not and cannot amount to a waiver of the defects. *Borst v. Town of Sharon*, 48 N. Y. Supp. 996, 24 A. D. 599; *McDonald v. City of New York*, 59 N. Y. Supp. 16, 42 A. D. 263; *Cotriss v. Village of Medina*, 124 N. Y. Supp. 507, 139 A. D. 872; *Purdy v. City of New York*, 193 N. Y. 521; *Walden v. City of Jamestown*, 178 N. Y. 217; *Carson v. Village of Dresden*, 202 N. Y. 414; *Winter v. City of Niagara Falls*, 190 N. Y. 198.

§ 98. Personal service unnecessary.

The officer upon whom the notice is to be served may designate a subordinate to receive it.

“ It is quite evident that the most strict construction of the statute would not require an absolute personal delivery to the comptroller. The onerous and multifarious duties devolved upon the comptroller of this great municipality exclude such construction, and, as the act of receiving and filing a claim is a purely ministerial act, the comptroller could appoint a clerk or clerks for such purpose. This seems to be admitted by appellant. But it is asserted that he could not appoint an auditor of a borough to perform such duty. Cer-

tainly it would not be denied that the comptroller could designate the auditors, or any of them, in the main office of the comptroller, to receive and file such claims, or appoint any other person for such purpose." *McDonald v. City of New York*, 59 N. Y. Supp. 16, 42 A. D. 263.

See also *Missano v. Mayor of New York*, 160 N. Y. 123; *McMahon v. Mayor of New York*, 37 N. Y. Supp. 289, 1 A. D. 321.

§ 99. Verification.

Where verification of the notice is required the statute must be complied with. It will not be sufficient to serve a verified complaint after the notice. *Cotriss v. Village of Medina*, 124 N. Y. Supp. 507, 139 A. D. 872; *Frank v. City of New York*, 75 Misc. 472, 133 N. Y. Supp. 434.

§ 100. Extension of time; impossibility of compliance.

It has been held, in the case of actions for personal injuries, that if the plaintiff has been so injured as to make compliance with the statute impossible within the time fixed, that the plaintiff's time is reasonably extended. What is a reasonable time is a question of fact. In other words, the service of the notice as soon as it can reasonably be served after the disability is removed is a substantial compliance with the statute, within the meaning of the authorities heretofore cited. *Winter v. City of Niagara Falls*, 190 N. Y. 198; *Forsyth v. City of Oswego*, 191 N. Y. 441; *Walden v. City of Jamestown*, 178 N. Y. 213; *Murphy v. Village of Ft. Edward*, 144 N. Y. Supp. 451, 159 A. D. 471.

§ 101. Amendment of complaint.

The plaintiff is not limited to the exact amount mentioned in the notice, but the court has power to

permit an amendment of the complaint so as to demand judgment for a larger amount.

In *Eggleston v. Town of Chautauqua*, 86 N. Y. Supp. 279, 90 A. D. 314, the court says:

“ No provision is made by statute for amending the statement after it was served and no new statement can be served after the expiration of six months after the accident. In this case the real nature and extent of the injury was not discovered until six months had expired. The statement is to be ‘ of the cause of action ’—it might well state the nature and extent of the injuries sustained and the amount of damages claimed therefor, but the amount of damages would be merely an estimate and the plaintiff would not be restricted to the amount named.”

See also *Reed v. Mayor of New York*, 97 N. Y. 620.

§ 102. Not retroactive.

Such statutes are not applicable to cases arising before the enactment of the statute unless expressly so provided in the statute. *Sehl v. City of Syracuse*, 81 N. Y. Supp. 482, 81 A. D. 543.

§ 103. Must be by claimant or agent.

The notice of claim must be presented by the claimant or his duly authorized representative. The fact that notice of the existence of the claim has come to the proper official indirectly does not excuse compliance with the statute. It was so held in *Ruprecht v. City of New York*, 92 N. Y. Supp. 421, 102 A. D. 309.

In this case the plaintiff was hired as an expert by a deputy commissioner. He submitted his bills to the commissioner who approved of them, prepared vouchers and sent them to the head of department, by whom they were forwarded to the comptroller, who exam-

ined them and refused to pay them. Plaintiff then brought this action. The procedure which was taken by the officials was in obedience to the requirements of § 149 of the New York Charter. The plaintiff made no effort whatsoever to comply with § 261 of the charter and the question here is whether or not notice incidental to the observance of § 149 was such a compliance with § 261 of the charter as to enable the plaintiff to bring the action against the city.

The court decided that inasmuch as the claim was forwarded to the comptroller under § 149, he had no reason to suppose that it was forwarded under § 261. The object of the statute is to give the comptroller an opportunity to look into all claims, and in order to induce him to act as speedily as possible, the penalty is imposed, that unless he acts within thirty days the plaintiff may commence an action.

The opinion reads:

“ In numerous decisions the courts have held that under varying circumstances there has been a substantial compliance with similar statutes, but I am not aware of any case where the courts have approved the notice unless it originally emanated from the prospective party or his agent. I do not think that it could be said that the plaintiff when he presented his bill to the deputy commissioner constituted him an agent to present his claim to the comptroller as preliminary to a lawsuit.”

§ 104. Pleading.

Compliance with § 261, New York Charter, must be both alleged and proved. A failure to allege it renders the complaint demurrable, and a failure to prove it prevents recovery. *Smith v. City of New York*, 88 A. D. 606, 85 N. Y. Supp. 150; *Frank v. City of New York*, 75 Misc. 472, 133 N. Y. Supp. 434.

An answer by the city which denies any knowledge or information sufficient to form a belief where the complaint alleges compliance with the statute raises an issue. *Mack Paving Co. v. City of New York*, 142 A. D. 702, 127 N. Y. Supp. 738.

Where the statute provides that a failure to serve the proper notice shall be a bar to the action, the defense must be pleaded. *Hawley v. City of Johnstown*, 40 A. D. 568, 58 N. Y. Supp. 49.

A contractor with the City of New York, who has made an agreement without public letting, need not postpone action thereon against the city until it has been audited as required by § 149 of the New York Charter, but may bring such action when thirty days have elapsed since the filing of his claim with the comptroller if he refuses to act on it. *F. V. Smith Cont. Co. v. City of New York*, 128 N. Y. Supp. 351, 70 Misc. 132.

Examination under § 149 of the New York Charter.

Under § 149 of the New York Charter the comptroller may require any person presenting a claim for settlement to appear for examination under oath before him or a deputy comptroller on matters relative to the justness of such account. Under that provision any officer or officers of a corporation presenting a claim are subject to examination. The examination must be limited to matters relative to the claim presented. The examination must also be had by the comptroller prior to the commencement of any action against the city on account of the claim. If the comptroller desires any further information from the claimant, after the commencement of the action, he must proceed in accordance with the provisions of the Code of Civil Procedure. *Matter of Grout*, 105 A. D. 98, 93 N. Y. Supp. 711.

In *Matter of Farley v. Weil*, 63 Misc. 188, 118 N. Y. Supp. 465, it appears that the service of the subpoena for the attendance of the claimant for examination under § 149 of the New York Charter, need not be made personally upon the claimant, but may be made upon his attorney as designated in the notice of claim filed in pursuance of the provisions of § 261 of the New York Charter.

§ 105. Partial payments.

A failure to pay an installment upon a contract when due constitutes such a breach of the contract as to entitle the contractor to rescind the contract and recover for its breach, or to sue upon *quantum meruit* for the work performed. *Snyder v. City of New York*, 77 N. Y. Supp. 637, 74 A. D. 421; *Price v. City of New York*, 93 N. Y. Supp. 967, 104 A. D. 198; *Cranford v. City of New York*, 134 N. Y. Supp. 839, 150 A. D. 195; *McGrath v. Horgan*, 72 A. D. 152, 76 N. Y. Supp. 412.

But the owner has a reasonable time after the performance of the work and its certification in which to make the payments. A reasonable delay cannot be held to constitute a breach of the contract. Although the question of what is a reasonable time is ordinarily one for the jury, if the facts are undisputed it may be a question for the court.

It has been held, however, as a matter of law that nothing short of a delay of thirty days time after certification in making payment can be justifiable cause for a breach of contract in the case of contracts with the City of New York, and whether a delay over thirty days is unreasonable is a question of fact for the jury.

In the case of *Williams v. City of New York*, 114 N. Y. Supp. 652, 130 A. D. 182, the plaintiff claimed a breach of contract because of the failure of the de-

fendant to pay two installments. At the time when the work for which the claim was made was done, and after the amount thereof was certified, a lien was filed in the office of the comptroller so that it was impossible for the comptroller to immediately pay the amount certified as completed. The court decided that the defendant had a reasonable time within which to make payment after the removal of the disability by the satisfaction of the lien, and where there is nothing to show that the liability of the city is repudiated, such reasonable delay will not be considered a breach of contract. This necessity of time on the part of the city in making payments is recognized in § 261 of the charter which fixes thirty days as a reasonable delay. In the case cited the amount claimed had been due from the city since January 14th, but the liens which prevented payment were not removed until February 8th. On February 24th, sixteen days after the lien had been discharged the plaintiff served notice that he had elected to consider the failure to pay as a breach of the contract. The trial court held that the question of what was a reasonable time was a question of law for the court and not for the jury. The appellate court decided in view of the fact that certain delays had previously been recognized by the parties that in this case the question should have been left to the jury.

In *Cranford v. City of New York*, 150 A. D. 195, 134 N. Y. Supp. 839, it was provided that the engineer would each month make an estimate of the amount of work done, and that upon such estimate the contractor would be paid 95 per cent., but no time of payment was specified. On December 4th the plaintiff demanded that all payments due should be made within three days, and upon the city's failure to comply, he elected to rescind the contract. The last previous estimate had been made November 13th. It was decided

that no time of payment being provided, the payments had to be made in a reasonable time and that since but twenty-four days had elapsed between November 13th and December 7th, the date upon which the last estimate was made, the delay was not unreasonable. The court said:

“ If the plaintiff’s right to rescind had rested upon the non-payment of the September and October estimate, we think that there would have been a question of fact for the jury as to whether or not the delay was unreasonable, but as to the November estimate we are of the opinion that as a matter of law the delay was not unreasonable, and that a finding to the contrary could not be sustained.”

“ Furthermore, we are of the opinion that plaintiff’s demand on December 4th for what amounted to instant payment of the three estimates was unreasonable.”

In this case, as in the *Williams* case, there had previously been greater delays than that complained of, which had gone unchallenged, and a course of dealing had been thereby established which could not be changed without notice.

Where installment payments are provided for in contracts with the City of New York, at least 70 per cent. of the amount earned must be paid (§ 518 and § 521, City Ordinances), except in contracts for street improvement work, when 85 per cent. must be paid. § 422 of the Charter. An amount up to 90 per cent. of the amount due may be paid.

In *Schieffelin v. City of New York*, 122 N. Y. Supp. 502, 65 Misc. 609, the court says:

“ The provision of § 422 of the Charter (Laws 1901, ch. 466) by its very phraseology clearly relates to street improvement work, and not to such work as that involved in the contract in question. Furthermore, I

am of the opinion that, even under § 422 of the Charter, 70 per cent. which the comptroller is directed to pay to the contractors is a minimum payment only, and that the provision is intended for the protection of the contractor from unnecessary delay in his payments, and is not a prohibition against further payments by the city in a proper case. As a matter of fact § 518 of the City Ordinances provided that:

“ ‘ In all contracts for work for the City of New York where provision is made for the payment of the contract prices by installment, provision shall be inserted that the contract shall allow 10 per cent. of the contract price of the work actually done to remain as security until the whole work shall be completed according to the contract.’ ”

“ And the view which I have taken as to the applicability of § 422 of the Charter to street improvement work only, is confirmed by § 521 of the Ordinances, which provides that wherever assessment work is to be done for the city, monthly installments of 70 per cent. of the work performed shall be paid to the contractor, provided the amount of the work done on each installment shall amount to \$1,500.”

The section of the charter referred to has been amended since this decision was rendered and now provides for a minimum payment of 85 per cent. See § 90 of text.

Upon the subject of final payments, see also *Johnson v. City of New York*, 1 N. Y. Supp. 254, 28 Hun 620.

In *Hastings Land Imp. Co. v. Empire State Surety Co.*, 141 N. Y. Supp. 417, 156 A. D. 258, the contract provided that:

“ Payments will be made monthly upon proper certificates of the superintendent of the amount of work done to the extent of 80% of the amount of said certificate.”

In interpreting this provision of the contract, the court held that 80 per cent. of the superintendent's estimated value of the work done that month should be paid, and not merely 80 per cent. of an amount bearing the proportion to the full contract price, that the work done that month bore to the whole amount of work called for by the contract.

In a prior case, *Hawkins v. Burrell*, 74 N. Y. Supp. 1003, 69 A. D. 462, the contract named a price for the work and provided payments to be made: "As the work proceeds, a sum equal (in the opinion of the architect) with previous payments to 80 per cent. of the value of work done, and the balance of 20 per cent. when the work is completed and accepted by the architect." The court interpreted the provision as follows:

"The contract price fixes the value of the completed work, and 80 per cent. of the 'value of the work done' as the work proceeds, relates to the value of such partial work as measured by the value of the completed work. On any other theory the contractors might be entitled to the entire contract price in the middle of the work provided they were doing the work at such a loss as to make 80 per cent. of what the work then cost them equal to the entire contract price. Such a construction of the contract would be unreasonable if not absurd."

See also § 89, "Percentage of Cost;" "Architect's Fees."

Time of payment.

When no time of payment is specified in a contract, the payment is not due until the contract is completed. *Gurski v. Doscher*, 112 A. D. 345, 98 N. Y. Supp. 588, affirmed 190 N. Y. 536; *Smith v. Sheltering Arms*, 35

N. Y. Supp. 62, 89 Hun 70; *Rosen v. Bonagur*, 143 N. Y. Supp. 1059.

When a contract provides for payments by installments, but does not state the time when, nor the contingency upon which the several installments are to become due, the installments are due respectively when such proportion of the work is performed as the particular installment bears to the whole contract price. *Wright v. Reusens*, 133 N. Y. 298.

§ 106. Payment in property.

“ The rule in this state seems to be that where a party agrees to pay a specific sum, or, as in this case, the value of the services in some specific articles of property, and upon demand refuses or fails to deliver the property, his obligation is thereby converted to one for the payment of money.” *Publishing Co. v. Steamship Co.*, 148 N. Y. 39.

“ In *Weil v. Tyler*, 38 Mo. 545, the court says:

“ ‘ Where a party has agreed or obligated himself to pay in specific articles, he cannot be charged or proceeded against as for a money debt till demand is made and there is a refusal or neglect on his part to perform the contract; for until then he is in no default, and he has a right to insist on the terms of his agreement. And, on obvious principles, courts have no right to interfere with the contracts between parties, and to make one party pay money when by the terms of his contract he has agreed to pay, and the other party has agreed to receive, something else. As long as a party is ready and willing to comply with his contract he is entitled to stand by it, and it is only when he had been guilty of a breach that he is chargeable in a different manner.’ The question of demand does not arise upon the recovery of the chattel, but upon

the attitude of the plaintiff, in that it seeks to convert the obligation of the defendant to discharge his contract in part by a chattel to the payment of the money value thereof." *Otto Gas Engine Works v. Moore*, 139 A. D. 299, 123 N. Y. Supp. 934.

See also *Wintermute v. Cooke*, 73 N. Y. 107.

Re "Orders for Payment and Assignments," see Chapter XV.

§ 107. Damages. General rule.

Upon a breach of a contract the party offended may recover such damages as ordinarily and naturally result from the non-performance; they must be certain only in the sense that it must be clear that they have resulted from the breach; that the amount thereof may be uncertain or difficult of ascertainment is immaterial. *Meyer v. Haven*, 70 A. D. 529, 75 N. Y. Supp. 261; *Canavan v. Dwyer*, 35 N. Y. Supp. 763, 14 Misc. 304; *Nason Mfg. Co. v. Stephens*, 127 N. Y. 602.

§ 108. Breach by contractor.

"The measure of damages is the difference between what the owner would have had to pay to the contractor under the contract, if the contractor had performed, and the actual cost to the owner of completing the work, provided that the same was fair and reasonable.

"A party to a contract which has been broken by the other has a right to fulfill it for himself as nearly as may be, but he must not do this wantonly." Sutherland on Damages, p. 268.

"The measure of damages for the breach of the defendant's covenants was the reasonable cost of the work. The city could not proceed in a reckless or extravagant manner and charge the defendant for ex-

penses unnecessarily or unreasonably incurred,' *Mayor v. Second Ave. R. R. Co.*, 102 N. Y. 572, 7 N. E. 905, 55 Am. Rep. 839.

“ ‘The reasonable value of the work necessarily done . . . to fully complete the contract according to the plans and specifications should have been deducted from the contract price.’ *Powers v. City of Yonkers*, 114 N. Y. 145, 21 N. E. 132.” *National Contract. Co. v. Hudson River W. P. Co.*, 103 N. Y. Supp. 641, 118 A. D. 665 (reversed 192 N. Y. 209).

The case cited was reversed by the Court of Appeals, but the reversal does not affect the rule of damages which is well illustrated therein.

Where the work is of considerable magnitude requiring an extensive plant of machinery and apparatus, which would have been provided by the contractor if he had performed, it becomes necessary for the owner in completing the work to secure a similar plant. Proof must be offered of the reasonable cost of such equipment and the amount of its depreciation in performing the work. The amount of depreciation may be allowed as part of the owner's damages. Proof may be offered of the amount of the various kinds of work done and the reasonable cost thereof. Where the reasonable cost exceeds the contract price the owner is allowed to recover such difference as damages. Where the reasonable cost of doing the work is less than the contract price, the difference is credited to the contractor in reduction of damages. All items of work must be considered in the proof of damages since the contractor may have been able to perform some of the work at a lower figure than the contract price and he should be credited with any such difference in reduction of the damages. Where the contract contains a provision allowing alterations in the specifications in pursuance of which some of the work may

have been omitted, it is incumbent upon the owner to prove that such omissions were honestly made in pursuance of the contract. In the absence of such evidence the contractor will be entitled to show the amount of profit which he might have made on the work omitted, and such profit should be deducted from the amount proved by the owner as his damages.

Where a contractor abandoned his contract the owner completed the work and sought to recover as damages loss of rents owing to the delay caused by the plaintiff's breach. He failed to show that the breach necessarily delayed the work, and that the breach was the "proximate cause" of the loss, and therefore recovery was denied.

"The measure of his damages is the compensation for the loss reasonably and proximately resulting from the breach of the contract." *McGrath v. Horgan*, 72 A. D. 152, 76 N. Y. Supp. 412."

In an action by the owner against a contractor for a failure to build according to the plans and specifications, the measure of damages is the difference between the value of the buildings as actually constructed and what their value would have been if constructed in accordance with the contract, and not the cost of tearing down the buildings so far as they did not comply with the contract and rebuilding them as the contract required. *Walter v. Hagen*, 71 A. D. 40, 75 N. Y. Supp. 683; *Kidd v. McCormick*, 83 N. Y. 391.

But see *Brunold v. Glasser*, 53 N. Y. Supp. 1021, 25 Misc. 285.

The measure of damages for the breach of a covenant to repair is the reasonable cost of the repairs and not the sum expended in making them. *Mayor v. Second Ave. R. R.*, 102 N. Y. 572.

§ 109. Breach of sub-contractor.

For a breach of contract by a sub-contractor, he will be held liable to the contractor to the extent of the damages which flow directly from the breach. Thus, in *Haven v. Meyer*, 70 A. D. 529, 75 N. Y. Supp. 261, the contractor engaged to erect certain buildings and sublet the structural iron work. The contractor did the brick work and reached a stage where he was compelled to suspend work because of the sub-contractor's failure to proceed with the iron work, and notified the sub-contractor that he would be held liable for any damages resulting from the delay, and also that the walls were in danger of being blown down. The wall did blow down, and in an action for damages, the court points out that the contractor's damages might be comprised of the following items which should have been contemplated by the parties:

First.—Interest on a retained percentage held by the owner for the period of the delay caused.

Second.—The increased cost of doing the work resulting from the fact that the contractor was compelled to perform a large part of the work during the winter months.

Third.—The salaries and wages paid for the increased time of employment, as well as the value of the contractor's own time.

Fourth.—The actual value of rebuilding the wall blown down, the cost of removing the debris, cleaning bricks, material destroyed, etc.

Where a building contract requires the sub-contractors to complete their work within a fixed time, and provides that if they should delay the progress of the work so as to cause loss for which the general contractor should become liable, the sub-contractors should reimburse the general contractor for such loss; the

sub-contractor cannot be called upon to pay all amounts which the general contractor might be called upon to pay in completing the work, but only such loss as was caused by the delay of the sub-contractors. *Murphy v. No. 1 Wall Street Corporation*, 127 N. Y. Supp. 735, 142 A. D. 835.

§ 110. Breach by owner. Preparatory expenses; loss of profit.

The party injured is entitled to recover all his damages including gains prevented and losses sustained, provided they are certain and such as naturally follow the breach. Such damages as it is not certain resulted from the breach are excluded. But the fact that the amount of the damage is uncertain does not prevent a recovery of any amount.

“A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are elements of damage. Most contracts are entered into with the view of future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved they may form the measure of damage. As they are prospective they must to some extent be problematical, and yet on that account a person complaining is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rule of damages, to determine the compensation to be awarded for the breach.” *Wakeman v. Wheeler and Wilson Mfg. Co.*, 101 N. Y. 205.

Where the breach is on the part of the owner, the contractor is entitled to recover, (1) what he has already expended toward performance less the value of the materials on hand; (2) the profits that he would realize by performing the whole contract.

The reason for the rule allowing prospective profits is thus given in the case of *Danold v. State*, 89 N. Y. 36:

“ It may happen that in the work actually done under such contracts there is a loss which may be made up by the further and complete performance of the contract. Can the state arrest the further performance, deny the prospective profits and thus throw the loss upon the contractor? It may be too, as is claimed in this case, that the contractors with a view to the performance of their contract have sublet much of the work and thus come under obligations to individuals. Can the state arrest the performance of the contract and deny the contractors prospective profits while they are left under obligation for such profits to the persons with whom they are contracting? Prospective profits in such a case stand in lieu of performance.”

The measure of the damages is the difference between the cost of doing the work and what the contractor was to receive for it, making a reasonable allowance for the fact that the contractor is relieved from the loss of time attendant upon doing the work, and that he may devote his energies and use his machinery and equipment on other work, and in addition, the loss sustained by acts done and materials purchased in anticipation of performance. In the case last cited the court further says:

“ The damages claimed here are within the meaning of the law actual damages; they are not speculative, remote, contingent or uncertain; they are capable of very precise estimation. The moment these contracts

were signed, being valid and binding upon the parties, whatever value was in them belonged to the contractors; and when by the act of the state the contractors were deprived of that value, they suffered actual damages for which upon general principles of law and justice they should receive indemnity."

In the case of *Long Island Contracting and Supply Co. v. City of New York*, 204 N. Y. 73, the court says:

"In *United States v. Behan*, 110 U. S. 338, the court said: 'The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill, 61, they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation' . . . As before stated, the primary measure of damages is the amount of the party's loss; and this loss, as we have seen, may consist of two heads or classes of damage — actual outlay and anticipated

profit. . . . But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed."

As to the profits which may be recovered the court further says:

" This, however, does not include the profits of collateral enterprises in which the party has been induced to engage by relying on the performance of the contract. When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. . . . But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement."

With reference to the contractor's right to recover for the loss sustained because of preparations made by him in anticipation of complete performance of the

contract, the court says in the case of *Dillon v. Anderson*, 43 N. Y. 231:

“It has been laid down that in an action brought upon an agreement, full performance of which has been prevented by the defendant, the damages of the plaintiff are such profits as he would have made had the contract been fully carried out. But in many cases, as in this, materials for the performance of the contract may have been got and labor expended in good faith before the notice to stop has been given, and the materials, by the labor put upon them for a particular purpose, may have been depreciated in value for general purposes. It is manifest that the plaintiff cannot be fully indemnified in such a case unless he is repaid for such labor and for any loss sustained upon such materials.”

But before the contractor can recover for the loss due to preparatory expenses, he must show that the loss is not such as should have been included in the estimated cost of the work. In the case of *Beckwith v. City of New York*, 106 N. Y. Supp. 175, 121 A. D. 462, the court said:

“These profits were properly arrived at by deducting what it would cost to execute the contract from the contract price; and it may be conceded that the plaintiff could recover in addition to that any expense to which he was put and from which he could derive no benefit by reason of the defendant’s breach; but it was not shown that the plaintiff would lose the cost of the pipe and valves.” . . . “As to the other items of expense enumerated (cost of bond; expense of formulating bid; cost of plans), if allowable at all, they should have been included in the estimated cost of doing the work; but an examination of the evidence discloses that the prospective profits were arrived at

without including said items of expense in the estimated cost of doing the work; hence if allowed at all they should be deducted from the prospective profits."

See also *Thilemann v. City of New York*, 81 N. Y. Supp. 773, 82 A. D. 136; *McMaster v. State*, 108 N. Y. 556; *Witherbee v. Meyer*, 155 N. Y. 446; *Griffin v. Colver*, 16 N. Y. 489.

It seems also that even though the contract is being conducted at a loss, the contractor may recover nominal damages for the breach, and the incidental expenses necessarily made in anticipation of performance. *Borough Development Co. v. Harmon*, 139 N. Y. Supp. 362, 154 A. D. 689.

§ 111. Special circumstances causing damage.

Parties are presumed to contemplate the usual and natural consequences of a breach when the contract is made. *Meyer v. Haven*, 70 A. D. 529, 75 N. Y. Supp. 261. If the contract was made with reference to special circumstances fixing or affecting the amount of damages, and the circumstances were known by both parties, the damages resulting from the breach of such a contract would be the amount of injury which would ordinarily follow from a breach under those special circumstances. Thus:

"The general rule by which damages for breach of a contract of sale are measured is the difference between the contract price and the market price of the article at the time and place of delivery. This rule, however, is subject to exceptions when special damages may be recovered: (1) Where the article purchased is of a peculiar make or for a particular purpose, having either no market value or a value much greater to the purchaser than to the public generally; and (2) where the contract unfulfilled was to deliver

goods which the seller knows are the subject of an agreement by his purchaser under the terms of which the latter must deliver these goods, for which he is to obtain an advance price. In such cases it is held that the purchaser's profit is contemplated by the parties in making the contract and that they would measure the damages caused by the breach of it." *Atlas Portland Cement Co. v. Hopper*, 116 A. D. 449, 101 N. Y. Supp. 948.

It is not necessary that the parties should have knowledge of the amount of the special damage which will be incurred, nor all of the details of the special circumstances involved. *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487.

In the case of *Starbird v. Barrons*, 38 N. Y. 230, the plaintiff contracted with the defendants to carry merchandise from Rochester to New York by canal. The defendants agreed to load the boat in three days. The contract was made November 10th and there was at the time a break in the canal east of Rochester which would take about two days to repair before the boats could pass, and the object in the plaintiff demanding that the boat should be loaded in three days was, first, that it could get away before the other boats which were congregated there by reason of the break, and second, to avoid any chance of the boat being frozen in.

The defendants failed to load for eight days. The plaintiffs got the boat to Schenectady, where it was frozen in for the winter.

The court decided that parties having made the contract with full knowledge of the circumstances, the plaintiff's damages should not be limited to the loss of the freight. *Cross v. Beard*, 26 N. Y. 88; *Delafield v. Armsby Co.*, 131 A. D. 572, 116 N. Y. Supp. 71; *Ideal*

Wrench Co. v. Garvin Machine Co., 92 A. D. 187, 87 N. Y. Supp. 41; *Todd v. Gamble*, 148 N. Y. 382.

The circumstances giving rise to the special damages must be pleaded or they cannot be proved. *Barnes v. Brown*, 130 N. Y. 372.

The question of whether the parties had special circumstances in mind is a question of fact. *Czarnikow Co. v. Baxter*, 146 A. D. 81, 130 N. Y. Supp. 617.

§ 112. Opinion evidence.

Evidence of opinions as to the damages sustained will not be received. *Reed v. McConnell*, 101 N. Y. 270; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205.

§ 113. Duty to limit damage.

It is the duty of the party damaged to make the damages as small as possible. But he is not bound to incur any hazard, and is not responsible if adopting such course as experienced and competent men in the same field of work regarded as prudent and proper, another course might in the opinion of others equally experienced and skillful have been adopted which would have to some extent reduced the damages. *Roberts v. White*, 73 N. Y. 380.

The burden of showing that the damages might have been reduced is upon the defendant. *Peirce v. Cornell*, 117 A. D. 66, 102 N. Y. Supp. 102; *Dillon v. Anderson*, 43 N. Y. 231; *Claflin v. Meyer*, 75 N. Y. 260; *Wright v. Bank of Metropolis*, 110 N. Y. 237; *Milage v. Woodward*, 186 N. Y. 254.

§ 114. Waiver.

The fact that a party continues and completes performance on his part after a breach by the other does not constitute a waiver of damages for the breach.

The other party, though at liberty to rescind the contract is not obliged to do so, but if he sees a fair prospect, or even a reasonable hope, that he may perform notwithstanding the default of the other party, he may go on and complete his engagement; and if he ultimately fails despite a strenuous effort to perform, he can claim all the damages, and repair the losses he has suffered by the default of the other party. *Starbird v. Barrons*, 38 N. Y. 230.

Likewise in the case of *Mansfield v. N. Y. Central R. R.*, 102 N. Y. 205, where the plaintiff agreed to commence certain constructive work upon five days' notice that the foundations were ready. Notice was given before the foundations were completed. The contractor commenced work under protest. The court said at page 213:

“When the breach occurred the contractors undoubtedly had the option of refusing to commence their work until the foundations were actually ready, or to commence and prosecute it, relying upon the covenants of their contract to recover such damages as the breach occasioned them. After express notice to the defendants of their intention to hold them liable for the damages arising from the omission to complete the foundations, they elected to commence the prosecution of the work. This they were entitled to do and it constituted no waiver of their claim.”

But see *Parr v. Village of Greenbush*, 112 N. Y. at 259-260, to the effect that where a party refuses to perform a condition precedent, such as furnishing material necessary to the contractor's performance, the contractor cannot himself furnish the material and complete the contract and sue for breach of contract and recover the expenses of furnishing such material. The contractor may wait for the other party

to perform or sue for breach after demand and refusal. But if as in the case cited he furnishes the material, he does something which he is not authorized to do under his contract.

See also Waiver — “Forfeiture,” § 57; Waiver — “Performance,” § 36.

§ 115. Damages when contractor ejected.

Where the contractor is ejected and the owner completes the work under a clause permitting the ejection of the contractor for failure to prosecute diligently, the only burden imposed upon the owner is good faith in performing the work with reasonable care, having regard for the rights of the contractor. It matters not that the contractor might have had the work finished for a smaller sum than paid by the owner. If so, he should have prosecuted his work with reasonable diligence and completed his contract. He has no claim if the owner acting in good faith spends more than the contract price in completing the work. *Watts v. Board of Education*, 41 N. Y. Supp. 141, 9 A. D. 143.

And where the contractor is removed and the owner completes the work, the owner has the right not only to go forward with the work, but to complete or do again such work as has been improperly done by the contractor, and charge the same against the contractor's account. *Powers v. City of Yonkers*, 114 N. Y. 145.

Where the owner has the right to eject the contractor upon a certificate for not prosecuting the work diligently, and ejects him without procuring such certificate after the date for performance has passed, and the contractor acquiesces in such ejection, the contract is cancelled and the owner can recover damages caused by the delay only from the date fixed for the comple-

tion of the work up to the date of the cancellation. *General Supply Co. v. Goelet*, 133 N. Y. Supp. 978, 149 A. D. 80.

Where the contractor abandons the work without cause he has no claim for damages against the owner. *Nat'l Contract. Co. v. Hudson River W. P. Co.*, 118 A. D. 665, 103 N. Y. Supp. 641.

§ 116. Provision for cancellation or alteration. Impossibility.

In the case of *Coates v. Village of Nyack*, 111 N. Y. Supp. 476, 127 A. D. 153, the plaintiff engaged to construct certain water works for the defendant, and the contract contained a provision that the defendant was to have the right to cancel the agreement at any time in its discretion if it appeared that its interests so required. The plaintiff was then to be paid in full for all work done prior to the date of suspension or cancellation. The main question involved in the case is as to what the plaintiff was entitled to collect from the defendant as damages as the result of such suspension. The court says:

“ Under the terms of the contract the plaintiffs were bound to contemplate the possibility of the termination of the contract whenever the defendant's officers deemed it for the best interests of the village; and, as they were thereby relegated to recover for work done, they cannot recover for the materials brought to hand or the instruments procured for the doing of the work. If any of the materials, tools, etc., were taken or kept by the defendant then the plaintiffs might recover on the theory of the conversion. For these reasons, I think that these items should be excluded from the case under the present pleadings in any event, without prejudice, however, to the plaintiffs to recover by conversion or appropriate action for the material or tools,

etc., which they assert were left upon the premises and which they were prevented from taking away."

In the case of *Kinser Construction Co. v. State*, (Court of Claims) 125 N. Y. Supp. 46, 69 Misc. 78; (*same case*, 145 A. D. 21, 129 N. Y. Supp. 567, 204 N. Y. 381), it developed after partial performance that the condition of the soil was such as to make further performance impossible. There was a provision permitting an alteration of plans by the state. Damages for prospective profits were refused, but recovery was allowed for the work actually done, material on hand delivered at the work at the time of the stop order, and damages resulting from a delay in issuing the stop order.

See also *Curnan v. D. & O. R. R.*, 138 N. Y. 480.

See "Impossibility of Performance," §§ 38-42; "Right to Alter Specifications," § 84; "Abandonment," etc., § 45; "Breach of Contract and Extra Work," § 75.

§ 117. Remedies.

When a contract is broken by the owner the contractor has his choice of two remedies: (1) He may treat the contract as continuing although broken and recover damages for its breach; (2) he may treat the contract as rescinded and recover upon a *quantum meruit* for all work done by him up to the time of the breach and unpaid for. But under the latter form of action no recovery can be had for prospective profits. If the contract has been fully or substantially performed, and nothing remains to be done but to pay the consideration, he can recover the full contract price in either form of action.

In the case of *Clark v. Mayor of New York*, 4 N. Y. 338, the plaintiff had contracted for the construction

of part of the Croton aqueduct, and claimed that after part performance the defendant had prevented them from concluding the work and that the plaintiff thereby lost the benefit of the prospective profits of the contract. The action was brought on a *quantum meruit*. The court says:

“ When parties deviate from the terms of a special contract, the contract price will, so far as applicable, generally be the rule of damages. But when the contract is terminated by one party against the consent of the other, the latter will not be confined to the contract price, but may bring this action for a breach of the contract and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract; or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. But in the latter case he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. He cannot assume the contract price as the true value of the work necessary to complete the whole job, and then recover the proportion which the work done will bear to the whole job, although it may amount to more than either the contract price or the actual value. This would be allowing indirectly a recovery for speculative profits upon the common counts. If the party seeks to recover more than the actual worth of his work, in a case where he has been prevented from performing the entire contract, he must resort to his action directly upon the contract; but when he elects to consider the contract rescinded, and goes upon the *quantum meruit*, the actual value is the rule of damages. The injustice of any other rule is very apparent in this case. Sev-

eral different kinds of work are specified in the contract, and a specific price per yard attached to each. The plaintiffs have selected the rock excavation from the different kinds of work specified, and proved that the part performed was worth some three times as much per yard as the part remaining unperformed, and have recovered accordingly; although had all the different kinds of work specified in the contract been taken into consideration, it is quite probable that upon a general average of the work the part performed would be found no more difficult than that remaining unperformed. It is in all events quite clear, that justice would not be done without an investigation of all the different kinds of work specified. The contract is entire, and if it be resorted to at all as regulating the damages, it should only be resorted to in connection with all kinds of work specified therein."

In *Cranford v. City of New York*, 134 N. Y. Supp. 839, 150 A. D. 195, the plaintiff rescinded the contract for non-payment of installments and brought his action upon *quantum meruit* to recover an amount in excess of the contract price. The court held:

"The plaintiff could not in any event recover more than the contract price of the work actually performed. It is not contended that the city was guilty of wanton or wilful default, or that the cost of performing the work was enhanced by any act of the city or its officers. Under these circumstances the contract price would determine the damages."

Where the action is upon *quantum meruit*, it is not necessary for the contractor to tender to the owner the amount paid him on account. It is sufficient that he credits the same. *O'Dwyer v. Smith*, 77 N. Y. Supp. 88, 38 Misc. 136; *Toher v. Schaeffer*, 91 N. Y. Supp. 4, 45 Misc. 618; *Day v. Eisele*, 78 N. Y. Supp. 396; *Bar-*

num v. Williams, 102 N. Y. Supp. 874; *Purdy v. Nova Scotia Ry.*, 32 N. Y. Supp. 157, 11 Misc. 406; *Zimmerman v. Jourgensen*, 23 N. Y. Supp. 170, 70 Hun 222.

§ 118. Full performance.

Where the contractor has fully performed and the owner refuses to pay the consideration, the contractor may recover either on an action for the breach of contract or upon a *quantum meruit*. And where the plaintiff pleads both causes of action it is error to compel him to elect in advance of the trial as to the form of action which he will pursue.

“The case is therefore within the well-settled rule that where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on this implied assumpsit or on the express agreement. A new cause of action upon such performance arises from this legal duty in like manner as if the act done had been done upon a general request without an express agreement.” *Farron v. Sherwood*, 17 N. Y. 227.

In the case of *Rubin v. Cohen*, 113 N. Y. Supp. 843, 129 A. D. 395, the court said:

“With respect to services performed and materials furnished it has become the settled law that under a declaration on a special contract, if the proofs fail in establishing such contract, but do in fact show a rendition of services, a recovery may be had upon a *quantum meruit*. Likewise, it is also settled that in an action for services on *quantum meruit* a specific contract may be proved fixing the price, and the price so specified then becomes the value. . . . Where any express contract not under seal has been fully performed, and nothing remains to be

done except to pay money in consideration of such performance, a plaintiff need not declare specially on the contract, but may count upon the implied assumpsit of the defendant to pay him the stipulated price. . . . In actions for services, or for materials furnished, or for goods sold, it often happens that the complaint alleges both value and agreed price. Such an allegation does not state two causes of action, because the defendant may have specially agreed to pay the value.

In view of the fact that it is permissible to sue for services under a special contract, and, if that is not proved, recover upon *quantum meruit*, it has been repeatedly held, even where the complaint contains two counts for services, one under special contract and one on *quantum meruit*, that the plaintiff should not be compelled on motion in advance of the trial, to elect upon which count he will proceed. . . . Where a complaint manifestly pleads a specifically agreed price, an allegation of value will be treated simply as surplusage, rather than as an attempt to state two causes of action, where the market value does not appear to have been the specially agreed price."

See also *Boyd v. Vale*, 82 N. Y. Supp. 932, 84 A. D. 414; *Hartley v. Murtha*, 39 N. Y. Supp. 212, 5 A. D. 408; *Schulze v. Farrell*, 126 N. Y. Supp. 678, 142 A. D. 13; *Byrne v. Gillies Co.*, 129 N. Y. Supp. 602, 144 A. D. 677; *Keister v. Rankin*, 51 N. Y. Supp. 634, 29 A. D. 539; *Walar v. Rechnitz*, 110 N. Y. Supp. 777, 126 A. D. 424.

When the contract has been fully performed and the action is brought upon *quantum meruit*, the contract may be used for the purpose of fixing the rights of the parties, and the contract price may become the *quantum meruit*. But if the breach of the owner has been other than a failure to pay the full or final in-

stallment of the consideration — in other words, if the contractor has been prevented from fully performing the contract — then the contractor, if he brings his action upon *quantum meruit*, must give evidence to prove what is the reasonable value of the services rendered or the materials supplied, and proof of the contract price is not admissible as such evidence. While the authorities seem to be somewhat confusing upon this subject, this seems to be the rule deducible from their examination.

In *Kronan v. Weisberg*, 135 N. Y. Supp. 404, 151 A. D. 355, where the action was upon *quantum meruit*, the court said:

“ If the plaintiff was entitled to recover at all it was upon the ground that the services had been actually rendered; and after the complete performance of an express contract there is no reason why a recovery may not be had under this form of pleading. The only effect in such a case of proof of an express contract for price is that the stipulated price becomes a *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading.”

In *Ludlow v. Dole*, 62 N. Y. 617, it was held:

“ Where in an action for labor and services the complaint seeks to recover on a *quantum meruit*, and upon the trial the only evidence of the value of the services is proof of an agreement on the part of defendant to pay a specific sum, this constitutes the measure of damages.

“ A direction, therefore, in such case, by the court to the jury, that they must render a verdict in favor of plaintiff for that sum or find for the defendant, is not error.”

Likewise, in *Gillies v. Manhattan Beach Imp. Co.*, 26 N. Y. Supp. 381, 73 Hun 507, affirmed 147 N. Y. 420:

“ The form of the action is not fatal to the plaintiff’s claim. He sued upon a *quantum meruit*. After full performance, such an action will be supported and the contract price be the measure of damages. The form of the action did not dispense with the certificate of the engineer, which was a prerequisite to a recovery. *Byron v. Low*, 109 N. Y. 291, 16 N. E. 45. When proof of final completion of the work is given a recovery may be had upon a complaint framed upon a *quantum meruit*. *Williams v. Slote*, 70 N. Y. 601; *Swan Lamp Manufacturing Co. v. Brush-Swan Electric Light Co.*, (Super. N. Y.) 18 N. Y. Supp. 869.”

In the case of *McAveney v. Pasquini*, 48 N. Y. Supp. 896, 23 A. D. 120, the contractor had admittedly only partially performed. As to the proof of the value of the services rendered, the court decided as follows:

“ The plaintiff was, therefore, bound to establish the value of the work done in such excavation. He seems to have been contented with showing that the price named in the contract was \$9,000.00, and that the whole work was completed, with the exception of about 500 yards, the value of removing which would have been \$500.00; that the defendants had a contract with the state for doing the same work at \$11,000.00, and had received payment of the entire amount. He claimed that the difference between the contract price and the amount left undone constituted the *quantum meruit*. This is an erroneous view of the law. The price named in the contract of the defendants with the state or in the sub-contract with the plaintiff furnishes no criterion of value.”

The court said further:

“ This is no evidence as to the value. It might have been admissible if the action had been brought for the contract price after the completion of the contract,

but it is not evidence where the action is on *quantum meruit*.”

It was likewise held in the case of *Wyckoff v. Taylor*, 43 N. Y. Supp. 31, 13 A. D. 240.

But expert witnesses testifying as to the value of work done may include therein the cost of labor and material and a reasonable profit in addition. *General Const. and Supply Co. v. Goelet*, 133 N. Y. Supp. 978, 149 A. D. 80.

If the plaintiff sues upon an express contract and cannot prove his case, but can prove a variation of the contract and thereby an implied agreement, he may recover upon a *quantum meruit* to the extent which he can prove. *Rubin v. Cohen*, 113 N. Y. Supp. 843, 129 A. D. 395; *Shirk v. Brookfield*, 79 N. Y. Supp. 225, 77 A. D. 295; *Lockhart v. Hamlin*, 190 N. Y. 132; *Wineburgh Adv. Co. v. Bloom*, 128 N. Y. Supp. 562; *Niles v. Sire*, 94 N. Y. Supp. 586, 46 Misc. 321; *Byrne v. Gillies Co.*, 129 N. Y. Supp. 602, 144 A. D. 677.

It must be noted, however, that this rule is only applicable where the two forms of action, either on *quantum meruit* or breach of contract, are not inconsistent with each other, and that the express conditions of a contract cannot be avoided by bringing the action in the form of a *quantum meruit*. In the case of *Wineburgh Adv. Co. v. Bloom*, 128 N. Y. Supp. 562, the court said:

“Whatever may have been the rule laid down by some of the older cases, it is quite evident that the courts are now uniform in holding that a recovery will be allowed upon a *quantum meruit*, where the plaintiff pleads a contract but fails to prove the value or the price fixed by the contract. A different rule applies where it is sought to recover on *quantum meruit* in the face of a contract different from and inconsistent with

an arrangement supporting a *quantum meruit*. This distinction is clearly shown in the late case of *Donovan v. Harriman*, 139 A. D. 586, 124 N. Y. Supp. 194."

In *Donovan v. Harriman*, 124 N. Y. Supp. 194, 139 A. D. 586, the court states:

"The theory upon which, in an action on an express contract for services, a recovery is allowed for the value of the services in the event that the plaintiff is unable to prove an express agreement with respect to such value, is that a recovery on the theory of a *quantum meruit* is entirely consistent with the complaint which is based upon the same services and to recover, not their actual value, but the value agreed upon by the parties. When, in such case, it appears that the parties did not agree upon the value of the services, then to obviate another action on the same facts and evidence the plaintiff is permitted to recover their actual value. In the case at bar, however, to permit the plaintiff to recover for the actual value of the services rendered, would be to make a new and materially different contract for the parties, which on the plaintiff's own theory of the case, as shown by his original complaint, was not contemplated."

See also *Exeter Machine Works v. Wonham Engine Works*, 134 A. D. 386, 119 N. Y. Supp. 105.

But it must be kept in mind that the recovery must be consistent with the cause of action alleged. And where the complaint alleges a special contract and performance in full, the courts hold that it is not permissible to show non-performance and excuses for the non-performance. *Weeks v. O'Brien*, 141 N. Y. 199; *Granger v. B-K Iron Works*, 204 N. Y. 218; *Kronan v. Weisberg*, 151 A. D. 355, 135 N. Y. Supp. 404.

Thus in the case of *Byron v. Low*, 109 N. Y. 291, an action brought to recover the balance alleged to be

due for work done under a contract between the parties and also for damages for loss of profits on work which the plaintiff alleged he was prevented from doing by the defendant. An engineer was made the arbitrator between the parties to estimate the amount of work done and certify to the amount due for the same, reserving 10 per cent. thereof until the last payment. In the case of full performance and upon the final estimate thereof by the chief engineer the amount due plus the reserved fund of 10 per cent. was to be paid to the plaintiff. The certificate was not produced nor was its production excused.

The Court of Appeals decided that the action had been brought upon the theory that the contract had been completely performed, since the work which was not done was omitted by direction of the defendant. As to that work, readiness to perform was proof of performance, and the plaintiff came into court standing upon the contract and demanding payment according to its terms and damages for the work withdrawn. Continuing, the court said:

“ This he had a right to do. In *McMaster v. The State* (108 N. Y. 542) we held that a breach in one respect was not necessarily waived by a continued performance thereafter, but that the contractor could go on and complete his contract, so far as possible, and recover according to its terms with damages for the breach, but those damages themselves founded upon the stipulations of the agreement. That is what this plaintiff did. The part of his work withdrawn was without difficulty severable from the body of the contract. The defendant wrongfully, as we must assume from the verdict of the jury, gave that work to others. The plaintiff notwithstanding continued his performance of the contract for a year or more, obeying its requirements and taking payments according

to its terms. He now sues upon the contract to compel the performance or its equivalent by the defendant and necessarily stands upon and affirms it. He cannot, in the present form of action, affirm it for one purpose and repudiate it for another. He cannot recover upon it as binding upon the defendant and deny its obligations upon himself. Hence, the condition precedent of the engineer's certificate could not be disregarded. When the amount to which plaintiff is entitled for the work done is settled and fixed by the selected arbitrator, that amount becomes due in ten days thereafter, and when it has been recovered, together with the damages, if any, for the work withdrawn, the plaintiff gets his exact rights under the contract on which he sues, and both parties have been made to obey its substantial terms. As the case was tried the contract was held to subsist for some purposes, but not for others, and to bind the defendant but not the plaintiff."

If in this case the plaintiff had stopped work when the defendant broke the contract by withdrawing part of the work he could have recovered for the part performance upon a *quantum meruit* without the production of the certificate.

See also *Kingsley v. City of Brooklyn*, 78 N. Y. 216; *Burtis v. Thompson*, 42 N. Y. 246; *Smith v. Wetmore*, 167 N. Y. 234; *Howard v. Daly*, 61 N. Y. 362 (*re* anticipatory breach).

§ 119. Contract under seal.

In the opinions in two of the cases cited heretofore to the effect that where a contract has been fully performed the action may be brought either upon *quantum meruit* or for breach of contract, the courts state that the contracts were not under seal. Why any such

distinction should be drawn is not apparent, but the implication is that had the contracts been under seal the *quantum meruit* action would not lie. Thus in *Rubin v. Cohen*, 113 N. Y. Supp. 843, 129 A. D. 395, the court said:

“Where an express contract not under seal has been fully performed and nothing remains to be done except to pay money in consideration of such performance, a plaintiff need not declare specially on the contract, but may count upon the implied assumpsit of the defendant to pay him the stipulated price.”

Likewise in the case of *Schulze v. Farrell*, 126 N. Y. Supp. 678, 142 A. D. 13, the court held that the action might be brought on *quantum meruit* to recover for work done on a contract not under seal, unless the plaintiff failed to fulfill the contract.

§ 120. Liquidated damages and penalty.

When the amount which may be recovered in the event of a breach of contract is fixed by the contract, it becomes necessary to determine whether the payment of such an amount constitutes the payment of damages or the payment of a penalty. If the provision is for the payment of a penalty, it is void, and only the actual damages proved may be recovered.

The language used by the parties is not conclusive. That the amount to be paid is designated by them as either a “penalty” or as “liquidated damages” is not controlling. *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230. The intent of the parties must be inquired into.

“Each case is to be considered in the light of its own facts in considering whether the provision is for liquidated damages or penalty.” *Fehlinger v. Boos*, 118 N. Y. Supp. 167.

Therefore, when there is a provision in the contract for a fixed payment, evidence of the amount of damages sustained must nevertheless be given by the owner.

The principal point to be inquired into is whether the payments provided for, in case of non-performance or tardy performance, are proportionate to the actual damages sustained. If they are, and the damages at the same time are uncertain, the provision for the payment of liquidated damages will generally be sustained.

In the case of *Curtis v. Van Bergh*, 161 N. Y. 47, the Court of Appeals said:

“ The question depends upon the intention of the parties, which is to be gathered from the language used in making the contract, read in the light of the circumstances surrounding them at the time.” . . .
“ It is, however, the law of this state, as settled by this court, that where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made ‘ are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss.’ ”

And in *Clement v. Cash*, 21 N. Y. 253:

“ When the damages resulting from a breach are uncertain in amount, as they are in all cases other than where the contract is to pay money, the parties have the right to say how much shall be paid by way of compensation to the party injured; and when they have settled that compensation, neither a court of law nor a court of equity will diminish its amount, unless

it is so grossly disproportionate to the actual injury that a man would start at the bare mention of it."

In the case of *Traub-Ditmar Const. Co. v. Hartman*, 61 Misc. 173, 112 N. Y. Supp. 919, the court said:

"To ascertain whether or not the amounts claimed as such liquidated damages are disproportionate, some evidence is necessary. If no evidence be offered on this subject, how is the court in position to fix the sum? It follows that, if there be no evidence *dehors* the contract the penalty or forfeiture, no matter how it may be described, will not be allowed. In other words, proof must be furnished upon which to base approximate actual damage. If the owner allows the contractor to complete after the time limit, or if delay be caused by the owner or by extra work, may he stand by and at the end recover arbitrary damages, to offset work performed and material furnished, without showing that he has been injured, or how, or to what extent? I know of no modern authority so holding."

See also *Holland Torpedo Boat Co. v. Nixon*, 115 N. Y. Supp. 573, 61 Misc. 469; *Peabody v. Richard Realty Co.*, 125 N. Y. Supp. 349, 69 Misc. 582, affirmed 129 N. Y. Supp. 1139, 145 A. D. 903; *Murphy v. U. S. Fidelity Co.*, 91 N. Y. Supp. 582, 100 A. D. 93; *Colwell v. Lawrence*, 38 N. Y. 71; *Schloss v. Troman*, 139 N. Y. Supp. 616, 154 A. D. 645; *Lampman v. Cochran*, 16 N. Y. 275; *Bagley v. Peddie*, 16 N. Y. 469; *McCann v. City of Albany*, 158 N. Y. 634; *Little v. Banks*, 85 N. Y. 258; *Brownold v. Rodbell*, 114 N. Y. Supp. 846, 130 A. D. 371; *Hicks v. Monarch Cycle Co.*, 176 N. Y. 111; *Feinsot v. Burstein*, 141 N. Y. Supp. 330.

§ 121. Time of recovery.

Where the owner completes the contract and there is a provision for the payment of daily damages for

delay, the owner can recover only from the time of abandonment to such time as it would reasonably take to complete the work. *Hutton Bros. v. Gordon*, 23 N. Y. Supp. 770, 2 Misc. 267.

§ 122. Cannot be apportioned.

Liquidated damages cannot be apportioned. If the failure of the contractor to complete the contract in accordance with its terms has been waived by the owner, the entire provision for the payment of liquidated damages is waived.

“It is well settled that where one party to a contract is himself responsible in whole or part for a delay in the completion, and has by his acts waived completion at the date fixed by the contract, the provision for liquidated damages is abrogated and the question becomes one of completion within a reasonable time under all the circumstances, and actual damages only can be recovered, there being no apportionment possible for liquidated damages.” *Holland Torpedo Boat Co. v. Nixon*, 115 N. Y. Supp. 573, 61 Misc. 469.

See also *General Supply Co. v. Goelet*, 133 N. Y. Supp. 978, 149 A. D. 80.

Provision may be made in the contract, however, for the restoration of the provision for the liquidated damages after the waiver. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 481.

See “Security on Bids,” § 46; also § 55.

§ 123. Interest.

The law is now well established in New York that interest may be recovered on claims which though not in the strictest sense liquidated, are such that the amount due can be ascertained by the debtor by computation. In the case of the breach of a contract for

the sale of an article, where the plaintiff seeks to recover the difference between the contract price and the market value, this means that there must be an established market value of the article, so that the defendant may be chargeable with knowledge of the amount of the plaintiff's damage. And while a market value may be proved for the purpose of enabling the plaintiff to recover his damage, it may be so indefinite that the damage will not carry interest except from the date of entry of the judgment. It was so decided in the case of *Gray v. Central R. R. of N. J.*, 157 N. Y. 483, where the action was for the breach of a contract for the sale of a ferry-boat.

The court points out also that this rule is not prejudicial to the plaintiff, because when the defendant refused to perform the plaintiff could have sued for the contract price of the vessel, in which case a recovery would carry interest, or he could have sold the vessel for the defendant's account and brought the action for the difference between the amount realized upon such sale and the contract price, in which case the recovery would also carry interest. But by retaining the property the plaintiffs brought themselves within the operation of the rule stated above so far as recovery of interest was concerned, and by failing to show that there was a definite market value they lost their right to recover interest.

In *Sloan v. Baird*, 162 N. Y. 327, the rule is stated as follows:

“ In an action to recover unliquidated damages for a breach of a contract, interest is not allowable unless there is an established market value of the property, or means accessible to the party sought to be charged of ascertaining by computation, or otherwise, the amount to which the plaintiff is entitled.”

That the computation of the amount due may be a matter of some difficulty does not relieve the debtor of the obligation to pay interest on it, if he is able to obtain proximate knowledge of how much he is to pay.

In the case of *Sweeny v. City of New York*, 173 N. Y. 414, (reversing 69 A. D. 80, 74 N. Y. Supp. 589) the contractors were employed to tear down the walls of a building destroyed by fire and remove the debris. They were to be paid a fixed amount for each kind of work. The court decided that the contractor might recover interest. The amount due him was a mere matter of computation and if the computation was difficult it was only because the parties had not kept accurate accounts, and not because it was impossible.

Where the plaintiff's claim is on contract and for extras, and the amount thereof is somewhat reduced for a failure to completely perform, the amount is unliquidated and therefore no recovery of interest can be had.

In *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, the court said:

“ While the old common-law rule has been modified which required that a demand should be liquidated, or its amount ascertained before interest could be allowed, the extent of its modification is that if the amount due is capable of being ascertained by mere computation the allowance of interest is proper.

“ In this case that was not possible when the contract price was subject to a reduction for damages, incapable of being ascertained as to amount, and when the claim for extra work was in dispute.”

In *Fox v. Davidson*, 97 N. Y. Supp. 603, 111 A. D. 174, the court said:

“ In his amended complaint plaintiff demanded

judgment for \$7,355.00 principal and interest thereon. His recovery was for only \$5,484.90. The amount of the plaintiff's claim depended upon, among other things, the reasonable value of certain work, labor and material, embraced in the contract but left unperformed by the contractor. This required proof both as to the items of the work not done and the fair value of performing the same according to the contract. The precise amount due to the plaintiff was neither fixed nor could it be ascertained by a mere mathematical calculation; and therefore it cannot be said that the claim was liquidated and drew interest."

No interest can be recovered on a claim for extra work the amount of which is, under the contract, to be fixed by arbitration, since the claim is not liquidated nor capable of liquidation by mere computation. *People ex rel. Cranford v. Wilcox*, 207 N. Y. 743; *Matter of Burke*, 117 A. D. 477, 102 N. Y. Supp. 785.

§ 124. On profits.

Interest cannot be recovered on damages for prospective profits on a contract for construction work.

"The ascertainment of prospective profits on such a contract as the one involved here depends upon many elements other than established market values, and it cannot be said that such profits could have been ascertained by mere computation." *Beckwith v. City of New York*, 106 N. Y. Supp. 175, 121 A. D. 462.

See also *White v. Miller*, 78 N. Y. 393, and cases cited therein; *Bradley v. McDonald*, 142 N. Y. Supp. 702, 157 A. D. 572; *Coates v. Village of Nyack*, 111 N. Y. Supp. 476, 127 A. D. 153; *O'Reilly v. Mahoney*, 108 N. Y. Supp. 53, 123 A. D. 275; *General Supply and Const. Co. v. Goelet*, 133 N. Y. Supp. 978, 149 A. D. 80; *Zimmerman v. Loft*, 110 N. Y. Supp. 499, 125 A. D.

725; *Kinzer v. State*, 125 N. Y. Supp. 46, 69 Misc. 78; *Reiser v. Commeau*, 129 A. D. 490, 114 N. Y. Supp. 154; *De Carricarti v. Blanco*, 121 N. Y. 230; *Shafer Fruit Co. v. Upton Co.*, 118 N. Y. Supp. 8, 133 A. D. 796; *Matter of Burke*, 117 A. D. 477, 102 N. Y. Supp. 785.

§ 125. Bonds.

Interest cannot be recovered on damages recovered on a bond for a failure to perform an act.

“The condition of this bond was the performance of an act, and not the payment of money. Under such circumstances a recovery is limited to the amount of the penalty, and interest runs only on the judgment.” *Sachs v. American Surety Co.*, 72 A. D. 66, 76 N. Y. Supp. 335.

But see *Degnon-McLean Const. Co. v. City Trust Co.*, 99 A. D. 195, 90 N. Y. Supp. 1029, affirmed 184 N. Y. 544; *Printing Co. v. Hallenbeck*, 61 N. Y. Supp. 1056, 46 A. D. 563. See Pingrey on Suretyship and Guaranty, § 74.

§ 126. Demand.

The interest runs from the date of the demand. If no demand is made the commencement of the action is sufficient demand. *Sweeny v. City of New York*, 173 N. Y. 414; *De Carricarti v. Blanco*, 121 N. Y. 230; *Kervin v. Utter*, 120 A. D. 610, 104 N. Y. Supp. 1061.

The rule as applicable to claims against municipalities is stated in *O’Keefe v. City of New York*, 176 N. Y. 297, as follows:

“It would be exceedingly difficult for the comptroller of a large city to look up claimants or their heirs or assigns and tender payment as their claims matured and became due. If interest at six per cent.

is chargeable from the date of the maturity of claims many persons might refrain from presenting them during the period permitted by the statute of limitations. The allowing of interest from such maturity would afford a safe and profitable investment which might become very attractive to many and induce them to buy up claims for the purpose of holding them for interest. This would impose a burden upon the city that it ought not to bear. The better and more just way is to follow the rule laid down in *Taylor v. Mayor* (67 N. Y. 87-94) and *Sweeny v. City*, and award interest on claims only after demand of payment has been made.”

See also *People ex rel. Hutchinson v. Sohmer*, 143 N. Y. Supp. 1086, 158 A. D. 642.

This rule applies to a separate department of a municipality. *Smith v. Board of Education*, 208 N. Y. 84.

§ 127. Question of law.

In the case of a breach of contract, the question of whether or not interest should be allowed is a question of law. *Mansfield v. N. Y. Central R. R.*, 114 N. Y. 331.

CHAPTER EIGHT.

MISCELLANEOUS PROVISIONS.

§ 128. Labor Law.

STATUTE.

“§ 3. Hours to constitute a day's work.

Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law. This section does not prevent an agreement for overwork at an increased compensation except upon work by or for the state or a municipal corporation, or by contractors or subcontractors therewith. Each contract to which the state or a municipal corporation or a commission appointed pursuant to law is a party which may involve the employment of laborers, workmen, or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood or danger to life or property. The wages to be paid for a legal day's work as hereinbefore defined to all classes of such laborers, workmen or mechanics upon all such public works, or upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Each such contract hereafter made shall contain a stipulation that each such laborer, workman or mechanic, employed by such contractor, sub-contractor or other person on, about or upon such public work, shall receive such wages herein provided for. Each contract for such public work hereafter made shall contain a provision that the same shall be void and of no effect unless the person or corporation making or performing the same shall comply with the provisions of this section; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, which in its form or manner of performance violates the provisions of this section, but nothing in this section shall be construed to apply to stationary firemen in state hospitals nor to other

persons regularly employed in state institutions, except mechanics, nor shall it apply to engineers, electricians and elevator men in the department of public buildings during the annual session of the legislature, nor to the construction, maintenance and repair of highways outside the limits of cities and villages." (Amended by Laws 1913, Chapter 494.)

" § 10. Cash payment of wages.

Every manufacturing, mining, quarrying, mercantile, railroad, street railway, canal, steamboat, telegraph and telephone company, every express company, every corporation engaged in harvesting and storing ice, and every water company, not municipal, and every person, firm or corporation, engaged in or upon any public work for the state or municipal corporation thereof, either as a contractor or a sub-contractor therewith, shall pay to each employee engaged in his, their or its business the wages earned by such employee in cash. No such company, person, firm or corporation shall hereafter pay such employees in scrip, commonly known as store money-orders. No person, firm or corporation engaged in carrying on public work under contract with the state or with any municipal corporation of the state, either as a contractor or sub-contractor therewith, shall, directly or indirectly, conduct or carry on what is commonly known as a company store, if there shall, at the time, be any store selling supplies within two miles of the place where such contract is being executed. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor."

" § 11. When wages are to be paid.

Every corporation or joint-stock association, or person carrying on the business thereof by lease or otherwise, shall pay weekly to each employee the wages earned by him to a day not more than six days prior to the date of such payment.

But every person or corporation operating a steam surface railroad shall, on or before the first day of each month, pay the employees thereof the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and on or before the fifteenth day of each month pay the employees thereof the wages earned by them during the last half of the preceding calendar month."

" § 14. Preference in employment of persons upon public works.

In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the con-

struction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

The constitutionality of the Labor Law was upheld in the case of *People ex rel. Williams Engineering Co. v. Metz*, 193 N. Y. 148. See also *Village of Medina v. Dingeldine*, N. Y. Court of Appeals, April 14, 1914.

The statute has been construed in *People ex rel. Hausauer Jones Printing Co. v. Zimmerman*, 109 N. Y. Supp. 396, 58 Misc. 264, where the court said:

"It cannot have been the purpose and intent of the act to make a contractor responsible for every accidental violation of the statute as to hours or wages. We do not understand it was the purpose of the legislature to impose the severe penalty of forfeiture of contract and compensation for every possible case where an employee works more than eight hours on a public job. . . . We think the statute rather imposes upon contractors the duty not only for themselves not to violate the provisions of the act, but to use every reasonable effort and diligence to cause those

acting for and representing them, to also observe the law in the respects required. If notwithstanding the express instructions and directions of contractors, and against their wishes, an employee labors more than the prescribed eight hours per day, it cannot be said that the contractor required or permitted it to be done. . . . To hold that under such circumstances a contractor forfeited all rights under his contract or to compensation earned for work done would outrage every sense of justice. . . . The statute imposes good faith and diligence on the contractor . . . it does not make him guarantee against every possible accidental and unintentional violation."

A contractor is not responsible for a violation committed by an employee of a sub-contractor without the knowledge or consent of the principal contractor. Nor is it a violation of the statute if the offense is committed prior to the awarding of the contract on work done in anticipation of receiving the award. *McFarlane v. Mosier & Summers*, 79 Misc. 460, 141 N. Y. Supp. 143.

See also *Ewen v. Thompson-Starrett Co.*, 208 N. Y. 245.

A violation of the statute makes the contract voidable not void. *People ex rel. Rodgers v. Coler*, 56 A. D. 98, 67 N. Y. Supp. 701.

And the burden of pleading and proving a violation of the statute is on the municipality. *Molloy v. Village of Briarcliff Manor*, 158 A. D. 456, 143 N. Y. Supp. 599.

See § 134a of the Labor Law with reference to the hours of labor in tunnels and caissons, etc., and § 626 and § 628 of the Education Law, with reference to the employment of children. See also provisions of the Penal Law, § 130.

§ 129. Payment of wages.

The following statutory provisions with reference to the payment of wages should be noted:

Labor Law.

§ 9 provides that:

"Payment of wages by receivers.

Upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employees of such partnership or corporation shall be preferred to every other debt or claim."

See also § 10 and § 11 of Labor Law providing for weekly payments in cash.

See *N. Y. C. & H. R. R. R. v. Williams*, 199 N. Y. 108.

Canal Law.

§ 145 provides:

"Security for payment of laborers.

The superintendent of public works or assistant superintendent having charge, shall also require and take from the contractor, a bond with at least two good and sufficient sureties, conditioned that such contractor will well and truly pay in full, at least once in each month, all laborers employed by him on the work specified in such contract, which shall be duly acknowledged and filed in the office of the clerk of the county wherein such contract or work is to be performed, and if partly in two or more counties, such bond or a certified copy thereof shall be filed in the clerk's office of each county.

Actions may be brought for a breach of such bond by any laborer not paid in accordance with its terms, and the commencement or maintenance of an action by one or more laborers thereon shall not be a bar to the commencement and maintenance of other actions thereon by other laborers. No action shall be maintained against the sureties unless brought within thirty days after the completion of the labor the payment of which is secured by the bond."

In the case of *Laudani v. Vulcan Engineering Co.*, 128 N. Y. Supp. 922, 70 Misc. 385, it was held that the state owes no obligation to person filing liens against

a defaulting contractor to apply the amount reserved from the contract price to the payment of their claims, rather than to a reduction of the liability of the sureties.

Railroad Law.

§ 50, Laws of 1910, provides as follows:

“Liability of corporation to employees of contractor.

An action may be maintained against any railroad corporation by any laborer for the amount due him from any contractor for the construction of any part of its road, for ninety or any less number of days' labor performed by him in constructing such road, if within twenty days thereafter a written notice shall have been served upon the corporation, and the action shall have been commenced after the expiration of ten days and within six months after the service of such notice, which shall contain a statement of the month and particular days upon which the labor was performed and for which it was unpaid, the price per day, the amount due, the name of the contractor from whom due, and the section upon which performed, and shall be signed by the laborer or his attorney and verified by him to the effect that of his own knowledge the statements contained in it are true. The notice shall be served by delivering the same to an engineer, agent or superintendent having charge of the section of the road upon which the labor was performed, personally, or by leaving it at his office or usual place of business with some person of suitable age or discretion; and if the corporation has no such agent, engineer or superintendent, or in case he cannot be found and has no place of business open, service may in like manner be made on any officer or director of the corporation.”

Personal Property Law.

§ 42 provides as follows:

“Regulating loans of money on salaries.

1. Any person or persons, firm, corporation or company, who shall after the passage of this act, make to any employee an advance of money, or loan, on account of salary or wages due or to be earned in the future by such individual, upon an assignment or note covering such loans or advances, shall not acquire any right to collect or attach the same while in the possession or control of the employer, unless such note or assignment is dated on the same day on which such loan is actually made, and unless within a period of three days after such

loan and assignment or note are actually made the party making such loan or loans and taking such assignment or notes shall have filed with the employer or employers of the individual or individuals so assigning his present or prospective salary or wages, a duly authenticated copy of such agreement or assignment or notes under which the claim is made. The day of making a loan or advance within the meaning of this act shall be deemed to be the day when the money is delivered to the borrower, and the subsequent execution of an instrument by virtue of a power of attorney shall not be deemed to affect the time of the actual making of such loan or advance.

2. No action shall be maintained in any of the courts of this state, brought by the holder of any such contract, assignment or notes, given by an employee for moneys loaned on account of salary or wages, in which it is sought to charge in any manner the employer or employers, unless a copy of such agreement, assignment or notes, together with a notice of lien, was duly filed with the employer or employers of the person making such agreement, assignment or notes, by the person or persons, corporation or company making said loan within three days after the said loan was actually made and the said agreement, assignment or notes were given as provided in the previous section.

3. Every person, firm or corporation engaged in or seeking to engage in the business of loaning money upon security of an assignment of salary or wages either earned or to be earned shall, on or before the first day of July next ensuing the passage of this act, file with the clerk of the county in which said person, firm or corporation has its place of business or transacts business a statement under oath containing the name and residence of the individual; or in case of a firm, the names and residences of the partners; or in the case of a corporation, the names and residences of the officers and directors, managers or trustees of such corporation; and the place or places where said business is transacted by such an individual, firm or corporation. After July the first next ensuing the passage of this act it shall be unlawful to engage in the business of loaning money in the manner set forth in this act without, prior to engaging in such business, filing a statement as provided in this act.

4. The several county clerks of this state shall keep an alphabetical index of all persons, firms or corporations filing certificates provided for herein, and for the indexing and filing of such certificates, they shall receive a fee of twenty-five cents. A copy of such certificate, duly certified to by the county clerk in whose office the same was filed, shall be presumptive evidence in all courts of law in this state of the facts therein contained.

5. After the passage of this act, no person shall directly or indirectly receive or accept for the use and sale of his personal credit or for making any advance or loan of money, either wholly or partly in anticipation of salary or wages due or to be earned, a greater sum than

at the rate of eighteen per centum per annum on the amount of such loan or advance, either as a bonus, interest or otherwise, or under the guise of a charge for investigating the status of a person applying for such loan or advance, drawing of papers or other service in connection with such loan or advance, except such charges as are now permitted by section three hundred and eighty of chapter twenty-five of the laws of nineteen hundred and nine, known as the 'general business law.'

6. Every person, firm, corporation, director, agent, officer or member thereof who shall violate any provision of this act, directly or indirectly, or assent to such violation, shall be guilty of a misdemeanor." (Amended by Laws 1911, Chapter 626.)

See *Matter of Stryker*, 158 N. Y. 526.

See § 57 and § 66 of the Stock Corporation Law, as to preference of wages of laborers.

See also *Farnum v. Harrison*, 145 N. Y. Supp. 36.

See also § 156, Highway Law. §§ 13, 25 and 56 of Lien Law.

§ 130. Penal Law.

The following provisions of the Penal Law should be noted:

"§ 380. Bribery of labor representatives.

A person who gives or offers to give any money or other things of value to any duly appointed representative of a labor organization with intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor; and no person shall be excused from attending and testifying, or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

"§ 531. Coercion by employers.

Any person or employer of labor, and any person of any corporation on behalf of such corporation, who shall hereafter coerce or compel any

person, employee, laborer or mechanic, to enter into an agreement, either written or verbal, from such person, employee, laborer or mechanic, not to join or become a member of any labor organization, as a condition of such person securing employment, or continuing in the employment of any such person, employer or corporation, shall be deemed guilty of a misdemeanor.

The penalty for such misdemeanor shall be imprisonment in a penal institution for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment."

" § 759. Refusal to permit employees to attend election.

A person or corporation who refuses to an employee entitled to vote at an election or town meeting, the privilege of attending thereat, as provided by the election law, or subjects such employee to a penalty or reduction of wages because of the exercise of such privilege, is guilty of a misdemeanor."

" § 1271. Hours of labor to be required.

Any person or corporation:

1. Who, contracting with the state or a municipal corporation, shall require more than eight hours work for a day's labor; or,

2. Who shall require more than ten hours labor, including one-half hour for dinner, to be performed within twelve consecutive hours, by the employees of a street surface and elevated railway owned or operated by corporations whose main line of travel or routes lie principally within the corporate limits of cities of more than one hundred thousand inhabitants; or

3. Who shall require the employees of a corporation owning or operating a brickyard to work contrary to the requirements of section five of the labor law; or

4. Who shall require or permit any employee engaged in or connected with the movement of any train of a corporation operating a line of railroad of thirty miles in length, or over, in whole or in part within this state, to remain on duty more than sixteen consecutive hours; or to require or permit any such employee who has been on duty sixteen consecutive hours to go on duty without having had at least ten hours off duty; or to require or permit any such employee who has been on duty sixteen hours in the aggregate in any twenty-four hour period, to continue on duty or to go on duty without having had at least eight hours off duty within such twenty-four hour period; except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal, is guilty of a

misdeemeanor, and on conviction therefor shall be punished by a fine of not less than five hundred nor more than one thousand dollars for each offense.

If any contractor with the state or a municipal corporation shall require more than eight hours for a day's labor, upon conviction therefor in addition to such fine, the contract shall be forfeited at the option of the municipal corporation."

" § 1272. Payment of wages.

A corporation or joint stock association or person carrying on the business thereof, by lease or otherwise, who does not pay the wages of all its employees in accordance with the provisions of the labor law, is guilty of a misdemeanor, and upon conviction therefor, shall be fined not less than one hundred nor more than ten thousand dollars for each offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense." (Amended by Laws 1909, Chapter 205.)

" § 1276. Negligently furnishing insecure scaffolding.

A person or corporation employing or directing another to do or perform any labor in the erection, repairing, altering or painting, any house, building or structure within this state, who knowingly or negligently furnishes or erects or causes to be furnished or erected for the performance of such labor, unsafe, unsuitable or improper scaffolding, hoists, stays, ladders or other mechanical contrivances; or who hinders or obstructs any officer detailed to inspect the same, destroys or defaces any notice posted thereon, or permits the use thereof after the same has been declared unsafe by such officer contrary to the provisions of article two of the labor law, is guilty of a misdemeanor."

" § 1277. Neglect to complete or plank floors of buildings constructed in cities.

A person, constructing a building in a city, as owner or contractor, who violates the provisions of article two of the labor law, relating to the completing or laying of floors, or the planking of such floors or tiers of beams as the work of construction progresses, is guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine for each offense of not less than twenty-five nor more than two hundred dollars."

" § 1423. Injuring highway boundary, pier, sea-wall, dock, rock, buoy, landmark, mile-board, pipe, main, sewer, machine, telegraph, or other property.

A person who willfully or maliciously displaces, removes, injures, or destroys:

1. A public highway or bridge, or a private way laid out by authority of law, or a bridge upon such public or private way; or,

2. A pier, boom, or dam, lawfully erected or maintained upon any water within the state, or hoists any gate in or about such dam; or,

3. A pile, or other material, fixed in the ground and used for securing any sea-bank or sea-walls, or the bank or dam of any river or other water, or any dock, quay, jetty, or lock; or,

4. A buoy or beacon, lawfully placed in any waters within the state; or,

5. A tree, rock, post, or other monument, which has been either erected or marked for the purpose of designating a point in the boundary of the state, or of a county, city, town or village, or of a farm, tract, or lot of land, or any mark or inscription thereon; or,

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall, unlawfully and willfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall willfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire, or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; or,

7. A pipe or main for conducting gas or water, or any works erected for supplying buildings with gas or water, or any appurtenances or appendage connected therewith; or,

8. A sewer or drain, or a pipe or main connected therewith or forming part thereof; or,

9. Destroys or damages with intent to destroy or render useless any engine, machine, tool or implement intended for use in trade or husbandry, is punishable by imprisonment for not more than two years.

10. Any person who shall without authority of the corporation owning the same open any fire-hydrant, except for the purpose of extinguishing a fire, or who shall wantonly injure or impair the same, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of ten dollars or by imprisonment in a county jail for the term of ten days; and it shall be the duty of all policemen, deputy sheriffs or constables to arrest any person found violating this subdivision.

11. A person who willfully or maliciously displaces, removes, injures

or destroys a mile-board, mile-stone, danger sign or signal, or guide sign or post, or any inscription thereon, lawfully within a public highway; or who, in any manner, paints, puts or affixes any business or commercial advertisement on or to any stone, tree, fence, stump, pole, building or other structure, which is the property of another, without first obtaining the written consent of such owner thereof, or who in any manner paints, puts or affixes such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, mile-stone, danger-sign, danger-signal, guide-sign, guide-post, billboard, building or other structure within the limits of a public highway is guilty of a misdemeanor. Any advertisement in or upon a public highway in violation of the provisions of this subdivision may be taken down, removed or destroyed by any one." (Amended by Laws 1911, Chapter 316.)

§ 131. Explosives.

The regulation of the sale, use and transportation of explosives within the City of New York is provided for in §§ 775 and 778c of the City Charter as amended by the Laws of 1914. These provisions abolish the Municipal Explosives Commission and authorize the Fire Commissioner to formulate such regulations as in his judgment may be necessary, and prohibits the sale, use, possession or transportation of explosives, except under license, and also provides for the licensing and bonding of employees engaged in the use or care of explosives. See *Joscelyn Stable Co. v. Johnson*, 142 N. Y. Supp. 643, 157 A. D. 779; *McIntosh v. Johnson*, N. Y. Court of Appeals, May 5, 1914.

See also § 364, Insurance Law, containing provisions relative to the transportation of explosives.

Regulations for the sale, use and storage of petroleum, coal oil, kerosene and other oils are provided in §§ 765 and 766 of the New York Charter.

See also § 100, General City Ordinances, and §§ 85 and 86 of Ordinances relating to the Borough of Manhattan.

§§ 302, 303 and 304 of the General Business Law, regulate the storage of petroleum, kerosene, etc., outside of the City of New York.

§ 123 of the Labor Law prohibits the storage of powder, oils, etc., in any mine, tunnel or quarry or in or around shafts, engines or boiler houses.

§ 125 of the Labor Law, authorizes the commissioner of labor to prescribe rules for the storage of explosives.

See § 134 of the Labor Law, relative to the explosion of blasts, and §§ 1894 and 1895 of the Penal Law, relative to the use of explosives.

§ 132. Licenses and permits.

Plumbing.

STATUTE. GENERAL CITY LAW.

“ § 45. Examinations; conducting business without certificate prohibited.

A person desiring or intending to conduct the trade, business or calling of a plumber or of plumbing in a city of this state as employing or master plumber, shall be required to submit to an examination before such examining board of plumbers as to his experience and qualifications for such trade, business or calling, and it shall not be lawful in any city of this state for a person to conduct such trade, business or calling, unless he shall have first obtained a certificate of competency from such board of the city in which he conducts or proposes to conduct such business.”

“ § 46. Registration; when required.

Every employing or master plumber carrying on his trade, business or calling in any city of this state shall register his name and address at the office of the board of health of the city in which he shall conduct such business, under such rules as the respective boards of health of each of the cities shall prescribe, and thereupon he shall be entitled to receive a certificate of such registration, provided, however, that such employing or master plumber shall at the time of applying for such registration hold a certificate of competency from an examining board of plumbers.”

By chapter 15 of the Ordinances of the City of New York, (the Building Code, § 141) and §§ 415, 416, N. Y. Charter, as added by Laws of 1913, every employing or master plumber is required annually in the month of March, to register his name and address at

the office of the department of buildings, and receive a certificate of such registration. The statutes further provide that no person, corporation or co-partnership shall engage in or carry on the trade of plumbing in the City of New York, unless the name of such person and the president, secretary or treasurer of such corporation and each member of such co-partnership shall be registered as above provided. These provisions, of course, apply only to the City of New York.

Unless the provisions of the foregoing statutes are complied with no recovery can be had in an action by a plumber for the services rendered. *Johnston v. Dahlgren*, 166 N. Y. 354; *Schmaier v. Grigsby*, 117 N. Y. Supp. 455, 132 A. D. 854; *Israel v. Wilson*, 134 N. Y. Supp. 536; *Wexler v. Rust*, 128 N. Y. Supp. 977, 144 A. D. 296.

And the statute cannot be evaded by the employment of a registered plumber in whose name the work is done. *Bronold v. Engler*, 194 N. Y. 323.

But the court in the latter case also said:

“ We do not say that any one, not a master plumber, making a contract, which provides to some extent for plumbing work, should fall within the inhibition of the statute. A builder might contract to erect and complete a house or other structure, including the plumbing work for a gross sum, and for that purpose he would have the right to employ a licensed master plumber to do the plumbing work. He would in such case in no fair sense be conducting ‘ the trade, business or calling ’ of a master plumber. It would be the mere incident of a larger work. In this case, however, the trade of a master plumber is the very business or trade which the plaintiffs hold themselves out as pursuing, and, therefore, falls within the inhibition of the statute.”

But where co-partners engage in the business of

plumbing, any statute which prohibits the business to be carried on by a firm, where one member who is actively engaged in the supervision of the work is properly registered, will be held to be unconstitutional. *Schnaier v. Navarre Hotel Co.*, 182 N. Y. 83; *Schnaier v. Grigsby*, 117 N. Y. Supp. 455, 132 A. D. 854.

A corporation is included within the word person (§ 37, General Construction Law) in the provisions of § 45 and § 46, General City Law, and cannot register, since it cannot obtain a certificate of competency. *Schnaier v. Grigsby*, 117 N. Y. Supp. 455, 132 A. D. 854.

But in the City of New York a method of registering plumbing corporations and licensing them is provided by § 141 of the Building Code, and such corporations may carry on the business in that city. *Messer v. Rothstein*, 113 N. Y. Supp. 772, 129 A. D. 215; affirmed 198 N. Y. 532.

Registration and licensing is a condition precedent which must be pleaded and proved by the plaintiff. And where a city ordinance is relied upon the ordinance must be proved since the court cannot take judicial notice of it. *Schnaier v. Grigsby*, 117 N. Y. Supp. 455, 132 A. D. 854.

Steam boilers and engineers.

§§ 342 and 343 of the New York Charter provides for the inspection of boilers and issuance of licenses to engineers for the operation of steam boilers.

§ 124 of the Labor Law provides for the inspection of steam boilers, lifts, hoists, etc.

In New York City.

Canal boats — wharfage.

Certain sections of the water front adjacent to the wharves of the City of New York are set apart for

the use of canal boats and barges, and the wharfage rates are fixed.

See §§ 854 to 863, New York City Charter.

Excavations, pavements.

In the City of New York the several borough presidents have jurisdiction to issue permits for the removal of pavement or for the disturbance of any street for any purpose whatever; (§ 391, charter) and he may grant such permits upon proper terms to secure a restoration of the street to its proper condition. See General City Ordinances, §§ 144 to 148; 138, 209 and 270.

Hoistways and hoists.

See §§ 263 and 358 to 360, General City Ordinances.

Moving buildings.

See § 269, General City Ordinances.

Private railroads on streets.

Permits from the public service commission and a city department to a contractor to operate a railroad on a street for the purpose of hauling material are invalid, since such right can only be granted by franchise; and abutting owners who own the fee in the street may sue to enjoin such illegal use of the street. *Bradley v. Degnon Contracting Co.*, 140 N. Y. Supp. 825, 80 Misc. 90.

See also *Turl v. N. Y. Contracting Co.*, 93 N. Y. Supp. 1103, 43 Misc. 164, which holds that the legislature can authorize structures in streets for business convenience that, without such authority, would under the common law be considered obstructions, and may

delegate such authority to the board of rapid transit commissioners of the City of New York.

Sewers.

Provisions regulating the granting of permits by borough presidents for the construction of or connection with sewers in the City of New York, are to be found in the General City Ordinances, §§ 152 to 168, and §§ 394 and 395 of the City Charter.

Water hydrants.

See §§ 288 to 295, General City Ordinances.

Building Code.

The code has the force of law, but the courts will not take judicial notice of its provisions for the reason that it is an ordinance and must be proved as any other ordinance. *Schnaier v. Grigsby*, 117 N. Y. Supp. 455, 132 A. D. 854. See also *People ex rel. Van Beuren v. Miller*, 146 N. Y. Supp. 403.

As to the power of the commissioner of buildings to vary provisions of the Building Code, see *Heyman v. Steich*, 114 N. Y. Supp. 603.

The Code does not extend to public property. *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 52, 123 A. D. 254, 108 N. Y. Supp. 84.

Relative to excavations and foundations, see *Steenek v. O'Leary Realty Co.*, 141 N. Y. Supp. 572, 80 Misc. 507; *Baxter v. N. Y. Realty Co.*, 112 N. Y. Supp. 455, 128 A. D. 79; *N. Y. Steam Co. v. Foundation Co.*, 123 A. D. 254, 108 N. Y. Supp. 84, 195 N. Y. 52.

Relative to unsafe buildings, surveys, court proceedings, etc., see *Matter of Unsafe Building*, 216 Broome St., 114 N. Y. Supp. 1018, 130 A. D. 396; *In re Jenkins*,

115 N. Y. Supp. 385, 130 A. D. 702; *Sweeny v. City of New York*, 173 N. Y. 414.

By chapter 156 of the Laws of 1911, adding §§ 60 to 68 to the General City Law, the supervision and regulation of plastering is placed under the jurisdiction of the Building Department of every city of the first class.

PART TWO.

MECHANICS' LIEN LAW.

CHAPTER NINE.

§ 133. Definitions.

STATUTE.

“§ 2. Definitions. Lienor.

The term lienor, when used in this chapter, means any person having a lien upon property by virtue of its provisions, and includes his successor in interest.

Real property.

The term real property, when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right of franchise granted by a municipal corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise.

Owner.

The term owner, when used in this chapter, includes the owner in fee of real property or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a municipal corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise. The purchaser of real

property at a statutory or judicial sale shall be deemed the owner thereof, from the time of such sale. If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent after such sale shall be a lien on any deposit made by him and not on the real property sold.

Improvement.

The term improvement, when used in this chapter, includes the erection, alteration or repair of any structure, upon, connected with, or beneath the surface of, any real property and any work done upon such property, or materials furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light.

Public improvement.

The term public improvement, when used in this chapter, means an improvement upon any real property belonging to the state or a municipal corporation.

Contractor.

The term contractor, when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof.

Sub-contractor.

The term sub-contractor, when used in this chapter, means a person who enters into a contract for the improvement of such real property with a contractor, or with a person who has contracted with or through such contractor, for the performance of his contract or any part thereof.

Laborer.

The term laborer, when used in this chapter, means any person who performs labor or services upon such improvement.

Material man.

The term material man, when used in this chapter, means any person other than a contractor who furnishes material for such improvement." (As amended by the Laws of 1914, Chapter 506.)

Lienor. The term lien as used in the definition excludes liens by way of mortgages or judgments, and therefore when the term "another lienor" is used, it refers only to another mechanic's lien.

Philbrick & Brother v. Florio Co-operative Ass'n, 122 N. Y. Supp. 341, 137 A. D. 613, affirmed 220 N. Y. 526.

The word property includes the money due upon a contract for a public improvement.

The right to acquire a mechanic's lien is purely statutory and therefore a personal right which cannot be assigned, since the assignee not having performed the labor or furnished the material is not within the terms of the statute (§ 3) allowing the lien. The protection intended to be given is for the security of the mechanic or material man whose labor and materials have gone into the improvement, and not for strangers who have merely purchased a debt. But after the notice has been filed the lien comes into existence and is a chose in action, and it may then be assigned. *Rollin v. Cross*, 45 N. Y. 766; *Ogden v. Alexander*, 140 N. Y. 356; *First Nat'l Bank v. Mitchell*, 93 N. Y. Supp. 231, 46 Misc. 30; *Chambers v. Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562; *Tisdale Lumber Co. v. Read Realty Co.*, 138 N. Y. Supp. 829, 154 A. D. 270.

A trustee in bankruptcy may acquire a mechanic's lien; *Held v. Burke*, 83 A. D. 509, 82 N. Y. Supp. 426; and likewise the successor of two consolidated corporations; *Chambers v. Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562.

Hence the term "successor in interest" as used in the statute may include such trustee, or consolidated corporation, and by the same reasoning should include an executor or administrator of one entitled to file a notice of lien.

For further authorities see "Who May Sue," § 215.

Real Property. The definition of the term real property denotes a legislative intent to enlarge rather than to restrict the statutory meaning of the term as

applied to the subject of mechanic's liens, thereby removing the property, structures, franchises and other rights mentioned in the statute from the realm of uncertain classification and placing them unmistakably in the category of real property and thereby subjecting them to the right of lien.

Therefore a lien may be acquired against a railroad corporation for materials furnished and used in the construction of its railroad, since it is a fair construction of §§ 2 and 3 of the statute, when read together, that any of the persons designated in the latter section may acquire a lien for the purpose therein named, and that the term real property shall not only include real estate, lands, tenements, hereditaments, corporeal and incorporeal, and fixtures, but also, and in addition thereto, all bridges, trestle work and structures connected therewith for the use of railroads. *Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306.

Owner. The lien is not granted against the real property, but against the interest of the owner in the property. The statute names those interests in real property against which a lien may be acquired. Hence it may and often does happen that one notice of lien must name several owners, each of whom has a different interest in the property, and against which a lien is claimed.

Therefore when a contractor, mechanic or material man proposes to erect a building, or to expend labor or material upon land under a contract with a person in possession it is incumbent upon him to inquire and assure himself that the person with whom he contemplates making the contract, or for whose benefit he is about to employ labor or furnish materials, has in fact such an estate or interest in the land as will enable him to assert a statutory lien.

The definition broadens the meaning of the term "owner" but not to such an extent as to give a lien against the interest of the owner when he is not named. The effect of § 9 of the statute, when read in conjunction with § 2, is not to give a lien against the interest of an owner when he is not named in the notice, but to give a lien against the interest of the person named, to the extent of his interest, even though he is not the owner in fee.

"The statute requires the notice to state the name of the owner against whose interest a lien is claimed, which will include *eo nomine* one who has any of the estates mentioned in section 2." . . . "The second section does enlarge the term 'owner' when used, and a notice designating a person as such will be valid, even if the ownership be not of the fee but that of some lesser estate or of some contractual interest in the property." *Strauchen v. Pace*, 195 N. Y. 167.

See § 163, "Name of owner."

A right of dower is not subject to a mechanic's lien, since it is not such an interest in real property as may be sold under execution. *Johnston v. Dahlgren*, 14 Misc. 623, 36 N. Y. Supp. 806.

One in actual possession under an unrecorded deed is the "owner" of the premises within § 2, and the notice may be directed to him as owner. Therefore a lien filed against such owner will, if first recorded and in the absence of fraud, take precedence over a lien against the owner of record. *Vogel & Binder v. Montgomery*, 133 A. D. 836, 118 N. Y. Supp. 10.

Improvement. The lien is given for all labor and materials which go to the permanent improvement of the real property, making the idea of permanence the crucial test. *Caldwell v. Glazier*, 138 A. D. 831, 123 N. Y. Supp. 622.

See also *Western Sash and Door Co. v. Ganst Const. Co.*, 126 N. Y. Supp. 1110; *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128.

But note that by an amendment of § 2 of the statute, by the laws of 1914, the term "improvement" has been so modified that it now includes any work done or materials furnished in equipping any structure with chandeliers, brackets and other fixtures for supplying gas and electric light.

See also §§ 141-143, "For What Lien May Be Acquired."

Public improvement. The term municipal corporation includes a county, town, village, city and school district, and any other territorial division of the state established by law, with powers of local government. General Corporation Law, § 3; General Municipal Law, § 2.

Contractor, sub-contractor and material man. By reading the definitions of the terms "contractor" and "material man" as given in the statute, it will be seen that a person who furnishes material for the improvement of real property is not necessarily a material man, to whom preference in payment is awarded.

"To come within the definition of the statute of a material man he must not only furnish materials, but he must not be a contractor, as also defined by the statute. By the express language of the statute any one who contracts directly with the owner, though it be only to furnish materials, is a contractor." *Jackson v. Egan*, 200 N. Y. 496, reversing 123 N. Y. Supp. 297, 138 A. D. 505.

The term material man also includes one who has produced or sold materials that are incorporated in

or attached to real estate by the labor of others, although such materials may have been specially manufactured for the building in question. *Chambers v. Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562.

The distinction has also been drawn between one who furnishes material to a contractor but does no labor and one who both furnishes material and performs labor in its installation. The former is a material man and the latter a sub-contractor. *Hermans & Grace v. City of New York*, 130 A. D. 531, 114 N. Y. Supp. 1107, affirmed 199 N. Y. 600.

Where the owner of property makes a contract for the erection of certain buildings with two men jointly, who subsequently divide the work by agreement that each will do a certain part for a fixed percentage of the contract price, each of them thereby becomes a sub-contractor under the joint contract. The claims of material men who supplied the two contractors would therefore be limited to the amount due each such sub-contractor under the amended agreement. *Vogel v. Whitmore*, 25 N. Y. Supp. 202, 72 Hun 417, affirmed 149 N. Y. 595.

See also *Stroebel v. Ochse*, 35 N. Y. Supp. 1089, 14 Misc. 522; *Pope v. Heckscher*, 109 A. D. 495, 96 N. Y. Supp. 533, affirmed 190 N. Y. 508; *Barnard v. Adorjan*, 101 N. Y. Supp. 502, 116 A. D. 535, affirmed 191 N. Y. 556; *Hall v. Thomas*, 111 N. Y. Supp. 979; *Hedden Const. Co. v. Proctor-Gamble Co.*, 114 N. Y. Supp. 1103, 62 Misc. 129.

Materials. It was the intention of the legislature to bring all labor performed or materials furnished in the improvement of real estate, no matter by what name they may be called or by what description they may be designated, within the beneficent purposes of the statute.

Schaghticoke Powder Co. v. G. & J. Ry. Co., 183 N. Y. 306.

See § 141 "For What Labor and Materials Lien May Be Acquired."

§ 133a. Construction of Lien Law.

STATUTE.

"§ 23. Construction of article.

This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same."

The Lien Law, being a remedial statute, must be construed liberally with a view to carry out its intent and for the accomplishment of every beneficial purpose contemplated. *Kane v. Kinney*, 174 N. Y. 69.

But § 23 does not permit the court to overlook any necessary statutory requirements. *Krauss v. Brunett*, 130 N. Y. Supp. 1086, 73 Misc. 428; *Fenichel v. Zicherman*, 139 N. Y. Supp. 118, 154 A. D. 471.

So the court is not authorized to dispense entirely with a provision of the statute declaring what a notice must contain, *Mahley v. German Bank*, 174 N. Y. 500; nor to supply an omission which the statute provides must be contained in the notice, *Pearce v. Knapp*, 127 N. Y. Supp. 1101, 71 Misc. 324; nor to pervert the statute so as to give a lien where none is authorized by the statute, *Matter of Goss v. Williams Engineering Co.*, 57 Misc. 78, 108 N. Y. Supp. 862.

An instance of where § 23 is properly applied is in considering the validity of a verification to a notice of lien. *McDonald v. Mayor of New York*, 170 N. Y. 409.

See also *Van Kannel Revolving Door Co. v. Sloane*, 104 N. Y. Supp. 653, 118 A. D. 908; *Newman Lumber*

Co. v. Wemple, 56 Misc. 168, 107 N. Y. Supp. 318; *Brace v. City of Gloversville*, 167 N. Y. 452; *Schwartz v. Lewis*, 123 N. Y. Supp. 319, 138 A. D. 566.

It is also provided in § 18, which relates to the duration of liens on public improvement contracts, that the section is a remedial statute, and is to be construed liberally to secure the beneficial interests and purposes thereof.

CHAPTER TEN.

ACQUISITION OF LIEN.

§ 134. Statute: Article 2, § 3.

“Mechanic’s lien on real property.

A contractor, sub-contractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article.”

§ 135. Against whose property lien may be acquired. Consent of owner.

The mechanic’s lien is created by statute. It does not necessarily arise from a contract with the owner but from the performance of services and the furnishing of materials for the improvement of his property, with his consent. It is not essential therefore that the lienor should have contracted directly with the owner. Where there is such a contract there can be no question of the owner’s consent to the improvement. Likewise where the person with whom the lienor contracted has a direct contract with the owner whose interest is to be charged. But if an attempt is made to charge the interest of an owner with whom there is no contract, it is necessary to show that the services were performed or the materials furnished with the consent of the owner whose interest in the property is to be charged with the lien. And thus the question of whether or not the owner has consented generally arises when it is attempted to charge the interest of

the owner in fee, by reason of the acts of an owner of a lesser estate. The consent of the owner may of course be admitted, or it may be shown by implication from his attitude, conduct and the circumstances surrounding the rendition of the services or the furnishing of the materials.

The cases in which it is attempted to deduce the owner's consent from the surrounding circumstances may generally be classified under one of the following headings:

(a) Vendor and vendee; (b) lessor and lessee; (c) principal and agent; (*i. e.*, husband and wife) where the lienor seeks to charge the interest of either the vendor, the lessor, or principal, as owner in fee because of a contract with the vendee, lessee, or agent.

Although the details of each particular case or classification of cases may differ, an examination of the decisions permits of a deduction of certain guiding principles applicable to all.

§ 136. (1) Owner's right to compel the improvement.

The consent of the owner in fee to the improvement cannot be implied from the mere fact that a lessee or vendee is given the right to make improvements to the property, if the owner cannot compel the same. The fact that the owner has the right to compel the improvements which are made will be considered as affirmative evidence of his consent to them. Consent involves a power of choice and the exercise of will respecting the subject thereof.

Thus a provision in a contract of sale: "It is further agreed that the vendee shall have the right of immediate possession to the property for the purpose of erecting buildings thereon," does not of itself constitute a consent by the owner to the improvements.

Such provision is permissive, but gives the owner no right to compel the improvement. *Beck v. Catholic University*, 172 N. Y. 387, reversing 71 N. Y. Supp. 370, 62 A. D. 599.

In the case of *Rice v. Culver*, 172 N. Y. 65, the court says:

“ It could not have been intended by the legislature (if it had the power) to enact that by the mere devise of land and property the owner should be subjected to the cost of structures or improvements which the tenant would have the right to erect by virtue of his estate under the lease. There is a marked distinction between the passive acquiescence of an owner in that he knows the improvements are being made, improvements which in many cases he has no right to prevent, and his actual and express consent or requirement that the improvement shall be made. It is the latter that constitutes the consent mentioned in the statute. To fall within that provision the owner must either be an affirmative factor in procuring the improvement to be made or having possession and control of the premises assent to the improvement in the expectation that he will reap the benefit of it. It was well said by Justice Follett in *Voseller v. Slater* (49 N. Y. Supp. 478, 25 A. D. 368, affirmed 163 N. Y. 564): ‘ The term “ with the consent of the owner,” as used in the statute, implies that the owner has power to give or withhold consent in respect to the construction, alteration or reparation of the building. In case the vendor in an executory contract has no authority to require the vendee to build, alter or repair, and has no power to prevent him from doing so, his interest cannot be charged with a mechanic’s lien for the erection, reparation or improvement of a building, ordered by the vendee simply because he (the vendor), knowing

that the work has to be done and knowing that it is being done, does not try to stop what he has no power to prevent.' "

See also *Barnard v. Adorjan*, 116 A. D. 535, 101 N. Y. Supp. 502, affirmed 191 N. Y. 556; *Hankinson v. Van Tine*, 152 N. Y. 20.

Nor can consent be implied from a general clause in a lease whereby the lessee " agrees to keep the premises in good order and repair during said term at its own cost and expense." The lessee is not thereby bound to do any more than he would be compelled by law to do if no such clause had been inserted in the lease. *Ætna Elevator Co. v. Deeves*, 125 A. D. 842, 110 N. Y. Supp. 124, 108 N. Y. Supp. 718, 57 Misc. 632.

See also *McNulty Bros. v. Offerman*, 141 A. D. 730, 126 N. Y. Supp. 763, 152 A. D. 181, 137 N. Y. Supp. 27.

Where the lease is silent as to repairs, the lessee has the right, if not the duty to repair, and the owner cannot prevent the same. If he cannot prevent them it cannot be said that by not endeavoring to do so he has consented to them. *McCauley v. Hatfield*, 28 N. Y. Supp. 648.

See also *Havens v. West Side El. L. and P. Co.*, 20 N. Y. Supp. 764; *Mosher v. Lewis*, 43 N. Y. Supp. 1052, 14 A. D. 565, 31 N. Y. Supp. 433, 10 Misc. 373; *Moore v. McLaughlin*, 42 N. Y. Supp. 256, 11 A. D. 477; *Jones v. Menke*, 168 N. Y. 61; *Tinsley v. Smith*, 115 A. D. 708, 101 N. Y. Supp. 382; *Pope v. Heckscher*, 109 A. D. 495, 96 N. Y. Supp. 533, affirmed 190 N. Y. 508; *Hobby v. Day*, 3 N. Y. Supp. 900.

§ 137. (2) Mere knowledge of improvement insufficient. Trespassers.

Mere knowledge on the part of the owner of the fact that the improvements are being made or passive

acquiescence on his part is insufficient to prove that he has consented within the meaning of the Lien Law. Thus after a lease is rescinded upon the failure of a lessee to execute the lease or pay rent, a contractor with the lessee can acquire no lien against the owner in fee. It is immaterial that such owner does not forcibly eject the contractor. If the contractor is employed by such trespasser no implication of consent on the part of the owner can arise. *Lowry v. Woolsey*, 31 N. Y. Supp. 1101, 83 Misc. 257, 146 N. Y. 375.

It was likewise held in the case of *Spruck v. McRoberts*, 139 N. Y. 193, where the owner had an action in ejectment pending to recover possession of his property at the time that the improvements were being made. The court said:

“When a contractor, mechanic or material man proposes to erect a building, or to expend labor or material upon land under a contract with a person in possession, it is incumbent upon him to inquire and to assure himself of the fact that the person with whom he contemplates making the contract, or for whose benefit he is about to employ labor or materials, has in fact such an estate or interest in the land as will enable him to assert a statutory lien. If he fails to do this, or is mistaken in his calculations and contracts with a person without title, the statute does not impress a lien upon the estate of the true owner unless he is in some way connected with the contract or has given his consent to the expenditure in such manner as to bind him within recognized principles of equity.”

But if the owner in addition to the mere knowledge of the carrying on of the work takes an active part in the supervision, direction and inspection of the improvement, such action on his part, in the absence of any expression to the contrary, will usually be considered sufficient evidence of consent.

Thus where a woman, the owner of property, allows her husband to construct a building thereon, and frequently visits the property during the course of the work, the fact that the material is charged in the name of the husband will not prevent the impression of a lien upon the property. *Schummer v. Clark*, 107 A. D. 207, 95 N. Y. Supp. 836; *Pearce v. Kenny*, 152 A. D. 638, 137 N. Y. Supp. 475; *Whipple v. Webb*, 89 N. Y. Supp. 900, 44 Misc. 332.

See also *Otis v. Dodd*, 90 N. Y. 336; *Mosher v. Lewis*, 14 A. D. 565, 43 N. Y. Supp. 1052, 10 Misc. 373, 31 N. Y. Supp. 433; *National Wall Paper Co. v. Sire*, 163 N. Y. 122; *Meistrell v. Baldwin*, 144 A. D. 660, 129 N. Y. Supp. 670; *LaPasta v. Weil*, 46 N. Y. Supp. 275, 20 Misc. 554; *Vosseller v. Slater*, 49 N. Y. Supp. 478, 25 A. D. 368, 163 N. Y. 564; *Rice v. Culver*, 172 N. Y. 65; *Kerwin v. Post*, 120 A. D. 179, 104 N. Y. Supp. 1005; *Butler v. Aquehonga Land Co.*, 86 A. D. 439, 83 N. Y. Supp. 834.

§ 138. (3) Benefit acquired.

The fact that the owner is to be benefited by the improvement is an element to be considered with the other circumstances in determining the question of the owner's consent. Thus in *Rice v. Culver*, 172 N. Y. 67, the court says:

“All structures or buildings erected by the lessee were to belong to and be removable by it. So long as the landlord received his rent, it was immaterial to him whether the premises lay idle and unimproved, or not. It is claimed that the appellant rendered his property liable because he signed an application to the local authorities to have the premises connected with the city water supply. The permit from the city was in no way a prerequisite to the construction of

the plumbing furnished by the plaintiff, however necessary it might have been in order to connect that plumbing with the water supply. . . . We imagine that the tenant, as an occupant of the land, could have compelled the city to supply it with water on complying with reasonable conditions and security for the payment of the water rates, even though the owner had refused to join in the application. However this may be, the act of the appellant in thus aiding his tenant in procuring the supply of water did not operate to make him liable for the improvements made by the tenant."

In *McNulty Bros. v. Offerman*, 141 A. D. 730, 126 N. Y. Supp. 763, 152 A. D. 181, 137 N. Y. Supp. 27, the repairs when made were to belong to the owner immediately; a concession of rent was made to the tenant to aid in the payment and also to allow for the time necessary for making the alterations. The court considered these facts as tending to support the lien.

See also *Barnard v. Adjoran*, 116 A. D. 535, 101 N. Y. Supp. 502, 191 N. Y. 556.

§ 139. (4) Limitation of consent.

Where the owner has consented to the improvement of his property he cannot limit the extent of his consent by fixing the amount beyond which he is not to be liable, although he may limit his liability as between himself and his tenant. *Wahle-Phillips Co. v. West Fifty-ninth Street Co.*, 153 A. D. 17, 138 N. Y. Supp. 13.

It is intimated by the court in *McNulty Bros. v. Offerman*, 141 A. D. 730, 126 N. Y. Supp. 763, 152 A. D. 181, 137 N. Y. Supp. 37, that if the tenant agrees to make certain repairs for which the owner agrees to pay the reasonable value, or a specified sum reasonably approximating such value, that it is then possible

that the relation between them may become a contractual one and thus limit the owner's liability to a sub-contractor or material man, to the amount due on the principal contract at the time of the filing of the lien as provided for in § 4. But the court in the case further said:

“ If a landlord, by agreeing with his tenant that the latter shall make alterations and improvements upon the building belonging to him, toward the expense of which he shall contribute some sum, however trifling, is thereby relieved from liability to the contractor or material man, an easy way has been discovered of defeating the purpose of the act, which has for its foundation the equitable principle that the owner whose property has been with his consent benefited by labor and materials, shall be liable for the same. Under such circumstances the liability of the owner is not limited by the amount which he agreed to pay on account thereof. . . . It is doubtless true that a general clause in a lease requiring compliance with the rules and regulations of a municipal department of health or buildings would not make an owner liable for repairs or alterations required thereby, and ordered by the tenant, which became necessary owing to his conduct subsequent to his entry on the demised premises. But where in connection with the giving of a lease it is contemplated that extensive changes and alterations shall be made by the tenant, and the lease contains a provision similar to that above quoted, if in connection with the work done, by reason of such rules and regulations, labor and materials beyond that originally contemplated become necessary in order to accomplish the desired result, the owner must be deemed to have consented to such additions. Under such circumstances the tenant is bound to so perform his work as to meet any additional exactions which

the law might have imposed during its progress, (*McManus v. Annett*, 101 A. D. 6, 91 N. Y. Supp. 808) and what the landlord obligated the tenant to do in that regard the landlord must be deemed to have consented to."

Likewise it is held where the owner contracts to convey property to a builder who agrees to execute and deliver a bond and mortgage co-ordinately with the delivery of the deed, it being provided that any liens filed before the delivery of the bond and mortgage shall be subject thereto. The owner cannot thus limit his consent so as to subordinate the liens to his mortgage. The statute cannot be thus circumvented, and the rights given by it to persons furnishing labor and material changed by stipulation unless such persons are parties to it. *Miller v. Mead*, 127 N. Y. 544.

But if the provision in the lease or contract specifies in detail what the improvements are to be and states the estimated cost thereof, the extent of the owner's liability may be thus limited. If the cost of the improvements, because of the doing of additional work, is materially increased, the owner will not be held to have consented thereto even though he may have acquiesced in its performance.

"Consent should not be implied contrary to the obvious truth unless upon equitable principles the owner should be estopped from asserting the truth. Here the owner carefully stated in the lease his position. . . ." *DeKlyn v. Gould*, 165 N. Y. 282.

See also *McLean v. Sanford*, 26 A. D. 603, 51 N. Y. Supp. 678.

Where a lease contains a provision that no repairs shall be made without the written consent of the landlord under penalty of forfeiture, the mere fact that consent is given for the purpose of avoiding forfeiture

is not evidence of a sufficient consent to charge the owner's property with a lien. *Hankinson v. Van Tine*, 152 N. Y. 20.

Where consent is given to make improvements subject to approval of plans and specifications, if the improvements are made without such approval the property may not be charged with a lien. *Hartley v. Murtha*, 36 A. D. 196, 56 N. Y. Supp. 686.

§ 140. Adjoining properties.

If the owners of adjoining lots convey them to one grantee, retaining legal title as security but permitting him to treat the lots as one, by building a house across them, the lots are chargeable with a material man's lien. *Miller v. Schmitt*, 67 N. Y. Supp. 1077.

Upon the general subject of consent see also the following cases:

Kealey v. Murray, 15 N. Y. Supp. 403; *Marshall v. Cohen*, 32 N. Y. Supp. 283, 11 Misc. 397; *Schmalz v. Mead*, 125 N. Y. 188; *Brunold v. Glasser*, 53 N. Y. Supp. 1021, 25 Misc. 285; *Butler v. Flynn*, 64 N. Y. Supp. 877, 51 A. D. 225; *Fischer v. Jordan*, 66 N. Y. Supp. 286, 54 A. D. 621, affirmed 169 N. Y. 615; *Kerrigan v. Fielding*, 62 N. Y. Supp. 115, 47 A. D. 246; *Steeves v. Sinclair*, 67 N. Y. Supp. 776, 56 A. D. 448; *Berger Mfg. Co. v. Zabriskie*, 75 N. Y. Supp. 1038; *N. Y. Elevator Co. v. Bremer*, 74 A. D. 400, 77 N. Y. Supp. 509, affirmed 175 N. Y. 520; *Bernard v. Adjoran*, 88 N. Y. Supp. 859, 43 Misc. 276; *Gilmour v. Colcord*, 96 A. D. 358, 89 N. Y. Supp. 689; *Seklir v. Krizer*, 96 N. Y. Supp. 74, 48 Misc. 25; *Robbins v. Arendt*, 23 N. Y. Supp. 1019, 4 Misc. 196; *New v. Carroll*, 26 N. Y. Supp. 320, 73 Hun 564; *Cowen v. Paddock*, 137 N. Y. 188; *Richardson v. Boynton*, 3 N. Y. Supp. 224; *Norton &*

Gorman Const. Co. v. Unique Const. Co., 195 N. Y. 81; *Regen v. Borst*, 32 N. Y. Supp. 810, 11 Misc. 92.

§ 141. For what labor and materials lien may be acquired.

In order to give rise to a lien the labor performed and materials furnished must have been for the permanent improvement of the property. An ordinary contract of sale of material, even though the materials delivered under it may have been later used in improving real property, cannot be the basis of a lien. It is necessary to show that the materials were delivered for the purpose of permanently improving the property. *Western Sash D. & L. Co. v. Gaust Const. Co.*, 126 N. Y. Supp. 1110; *Goodrich v. Gillies*, 17 N. Y. Supp. 88, 62 Hun 479.

But if the material is delivered for this purpose, the fact that it is not installed in the improvement will not prevent the impression of a lien. Thus, in the case of *Sears v. Wise*, 52 A. D. 118, 64 N. Y. Supp. 1063, the vendor delivered machinery sold under a contract by which the vendees were to install the machinery and the vendor was to supervise the starting and adjusting of it. The vendor acquired a valid lien for the machinery delivered but not installed, it appearing that the failure to install the machinery not installed was due in the first instance to a fire and later to the bankruptcy of the vendees.

§ 142. Several buildings.

Where materials are furnished for and are used indiscriminately in the erection of several contiguous buildings, they may be regarded as one building for the purpose of the Lien Law, and but one notice need be filed. *Hall v. Sheehan*, 69 N. Y. 618.

And a notice of lien may be filed against an entire

tract embracing different lots, where there is no separate contract for furnishing material to be used on the different lots, and if there is no proof that the owner holds title to the lots by virtue of separate agreements or descriptions, or that they do not in fact constitute but a single parcel. *Woolf v. Schaefer*, 103 A. D. 567, 93 N. Y. Supp. 184; *Miller v. Schmitt*, 67 N. Y. Supp. 1077; *Moran v. Chase*, 52 N. Y. 346; *Rightmeyer v. Doyle*, 152 A. D. 539, 137 N. Y. Supp. 482.

§ 143. Fixtures.

The statute provides that only those materials which are furnished for the purpose of permanently improving the property, (see definition of "improvement," § 133) may give rise to a mechanic's lien. The question of whether or not the material furnished is such, will be largely determined by the application of the principles of the law of fixtures.

At common law anything attached to real estate became a fixture whether permanently attached or not. But with the case of *Vorhees v. McGinnis*, 48 N. Y. 278, the courts began to inquire more into the intent of the parties in attaching the personal property to the real estate, and the court there lays down three tests to determine the question:

First. — The permanent annexation.

Second. — The application to the use or purpose to which that part of the realty with which it is connected is appropriated.

Third. — The intention of the parties to make a permanent accession to the freehold.

And now where all three of these elements are united, the property in question is always considered as part of the realty.

The effect of this decision is really to judicially

interpret the meaning of the word permanent. It is still maintained that to constitute a fixture the article must be permanently annexed to the realty. But whether there is a permanent annexation is made to depend upon the intention of the parties and the adaptability of the article to the use to which it is put as part of the freehold. Thus, as was said in *McCrea v. Central Bank of Troy*, 66 N. Y. 489:

“The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it.”

The mode of annexation may in the absence of other proof be controlling.

But each case must be determined upon its own facts, from the circumstances surrounding the transaction, the object and purpose of the annexation, and the actions and statements of the parties at the time, from which their intentions may be gathered.

In the case last cited the plaintiff erected a building to be used as a twine factory, and installed in it machinery for that purpose. He sold the property as a twine factory, and took back a mortgage the amount of which would have been greater than the value of the land and buildings without the machinery. The court held that the machinery was part of the realty. The intent that it should be so is clearly gathered from the action of the plaintiff and his designation of the property as a twine factory. Without the machinery it would not have been such. It would have been a building.

For other decisions on the subject of fixtures, see *Matter of City of New York*, 137 A. D. 630, 122 N. Y. Supp. 316; *Tiffet v. Horton*, 53 N. Y. 380; *Tyson v. Post*, 108 N. Y. 217; *Ward v. Kilpatrick*, 85 N. Y. 418; *Kribbs*

v. *Alford*, 120 N. Y. 519; *Sisson v. Hibbard*, 75 N. Y. 542; *Phipps v. State of New York*, 69 Misc. 295, 127 N. Y. Supp. 260; *Matter of Eureka Mower Co.*, 33 N. Y. Supp. 486, 86 Hun 309; *Pratt v. Baker*, 36 N. Y. Supp. 928, 92 Hun 331; *Hilton & Dodge Lumber Co. v. Murray*, 62 N. Y. Supp. 35, 47 A. D. 289; *Schreyer v. Jordan*, 58 N. Y. Supp. 206, 27 Misc. 643; *Williams v. London*, 61 Misc. 494, 115 N. Y. Supp. 547; *People ex rel. Starch Co. v. Waldron*, 26 A. D. 527; *Pfluger v. Carmichael*, 54 A. D. 154, 50 N. Y. Supp. 523.

To the effect that a mere statement of intention is not controlling upon one who has no knowledge of it, see *Andrews v. Powers*, 66 A. D. 216, 72 N. Y. Supp. 597; *Jemryn v. Hunter*, 93 A. D. 175, 87 N. Y. Supp. 546; *Conde v. Lee*, 55 A. D. 401, 67 N. Y. Supp. 157; *Weston v. Weston*, 86 A. D. 159, 83 N. Y. Supp. 528.

The application of the principles of the law of fixtures above set forth, in the interpretation of the meaning of the terms "materials" and "permanent improvement" as used in the Mechanic's Lien Law may be most clearly seen in the cases cited under the following headings hereinafter given:

"Fittings, Specially Made," § 147; "Gas & Electrical Fixtures," § 149; "Machines," § 151.

§ 144. Abandoned property.

When a contractor abandons his contract but leaves materials on the ground, which the owner accepts and uses, the relation of buyer and seller arises and the builder is entitled to a lien for the value of the material.

"From the moment the plaintiff abandoned the completion of his contract a new relation sprang up between him and the defendant, and his status as to the material left on the premises, the defendant having

paid nothing, was that of vendor, if the defendant used it for any purpose on the building. As to it the plaintiff became a furnisher of such material, with the right to become a lienor as well, and was entitled to recover its value." *Wollreich v. Fettretch*, 4 N. Y. Supp. 326.

Such a lien would be that of a contractor, and not of a material man, under *Jackson v. Egan*, 200 N. Y. 496.

See also *Hutton Bros. v. Gordon*, 23 N. Y. Supp. 773, 2 Misc. 267.

§ 145. Explosives; coal and oil.

Dynamite and explosives have been held to be materials within the Lien Law, for the supplying of which a lien may be acquired.

In the case of *Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306, the court said:

"It may be admitted that dynamite used in blasting rock or breaking up earth, does not in a narrow and technical sense enter into and remain a part of the permanent structure which contributes to the improvement of real estate. The same thing may be said of labor performed upon it. . . . Explosives used in the doing of work for the improvement of real property are materials within the meaning of the statute."

Until recently it had generally been the accepted law in New York, that a lien might also be acquired for the supplying of coal, oil and fuel consumed by a contractor in carrying on his work in the improvement of real property. Although the question was not directly in issue in either case, it was so stated in the following cases: *Zipp v. Fidelity Deposit Co.*, 76 N. Y. Supp. 386, 73 A. D. 20; *Upton v. United Engineering & Const. Co.*, 130 N. Y. Supp. 726, 72 Misc. 541.

In the latter case it was said:

“ The lien law is ‘ to be construed liberally to secure the beneficial interests and purposes thereof.’

“ By virtue of this salutary rule, it would be held that liens may be acquired for coal and oil delivered and furnished to run machinery on the real property or public improvement.” . . .

But in the case of *Schultz v. The C. H. Quereau Co., Inc.*, 210 N. Y. 257, decided by the New York Court of Appeals, February 24, 1914, it was held otherwise. It was there said that coal consumed in generating steam for the purpose of operating traction engines, was not “ materials ” furnished in the construction of a public improvement, under § 5 of the Lien Law.

After referring to the case of *Schaghticoke Powder Co. v. G. & J. Ry.* (*supra*) and *Troy Public Works Co. v. City of Yonkers*, 207 N. Y. 81, the court said:

“ The dynamite was applied directly to the earth which had to be removed so that the structure might be completed as planned. The removal of the earth was an essential part of the construction. The dynamite was furnished and used to effect, in part, by its direct action that construction and entered wholly into it. The construction primarily, and not mediately, absorbed and included it. It and the substances which in the process of construction took the place of the earth it released entered into the construction in the same sense and with the same reality although it did not remain a visible part of the completed improvement.

It was not thus with the steam shovel. It, as an article or substance, was not applied to the construction, upon the completion of which it remained substantially as it was at the beginning and ready to be taken to and used upon another undertaking. Its effects, and not it, were applied directly to the construction, which did not absorb or include it. It did

not lose its identity nor cease to exist as a separate article. It promoted and aided in but was not a material furnished for the construction. The distinction we are here expressing was made clear by our decisions already mentioned.

Was the coal used to operate the steam rollers and traction engines to be considered as an adjunct to those machines or as materials furnished for the construction of the highway? While Article 2 of the Lien Law, which contains § 5, should receive a liberal it should not be given a forced and unnatural construction or be extended to a state of facts not fairly within its general scope. The facts underlying the decision that the furnishing of the dynamite in the Schaghticoke case upheld a lien for its cost do not exist as to the coal furnished in this case. It was applied to the machines and not directly to the highway, and they and not it absorbed it."

§ 146. Demolition of buildings. Moving buildings.

The tearing down of an old building does not permanently improve the naked land. Such labor does not give the person performing it a lien. *Thompson-Starett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128.

Where the labor performed and materials furnished consist of moving a building from one lot and placing it permanently upon another lot, a lien will be sustained. *Norton & Gorman Co. v. Unique Const. Co.*, 195 N. Y. 81, reversing 121 A. D. 585, 106 N. Y. Supp. 372.

§ 147. Fittings specially made.

The case of *Reiser v. Commeau*, 129 A. D. 490, 114 N. Y. Supp. 154, 198 N. Y. 560, well illustrates the

applicability of the principles of the law of fixtures in the interpretation of the Mechanic's Lien Law.

The materials furnished for which a lien was sought were fittings for a library, consisting of double cases with shelves, exhibition cases, partition cases, platform, lockers, dressers, bulletin-boards and supply cases. These were required to be of the same wood as the finish of the rooms in which they were installed. The shelves were measured to fit the spaces in the rooms, and the various fixings were fastened by hold-fasts, nails, screws, angle irons and the like.

The structure was designed for a public library and adapted to such purpose. The building could not without such fittings have been used as a library. It would have been a room—not a library. The lien was sustained, the court saying:

“ The question is whether in fact and intention the work and materials have become part and parcel of the building. Were the labor performed and materials furnished for the purpose of making a permanent accession to the realty? ”

The following cases were cited and quoted with approval:

Grosz v. Jackson, 6 Daly 463, where it was held that in consideration of the fact that the building was a theatre, a lien might be impressed for chairs adapted to that purpose and screwed down in the auditorium; *Held v. City of New York*, 83 A. D. 509, 82 N. Y. Supp. 426, to the effect that desks and platforms in a public school were to be considered as fixtures and the proper subject of a lien.

See also *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1; *Union Stove Works v. Klingman*, 20 A. D. 451, 46 N. Y. Supp. 722; *Wahle-Phillips Co. v. West 59th Street Co.*, 153 A. D. 17, 138 N. Y. Supp. 13; *Chambers*

v. *George Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562.

§ 148. **Furnaces and ranges.**

In the cases of *Schwartz v. Allen*, 7 N. Y. Supp. 5, and *Union Stove Works v. Klingman*, 20 A. D. 449, 46 N. Y. Supp. 721, 164 N. Y. 589, liens for stoves and ranges, with their fittings and the labor of installing the same, were sustained. Tested by the rules stated in the case of *Reiser v. Commeau*, (see § 147) the liens would be sustained under the present law.

§ 149. **Gas and electrical fixtures.**

By an amendment to the statute, § 2 thereof, by the Laws of 1914, chapter 506, the term improvement has been so modified as to include any work done or materials furnished in equipping any structure with chandeliers, brackets or other fixtures for supplying gas or electric light. Prior to this amendment the courts held, under the statute, that gas and electric fixtures, especially designed and manufactured with reference to the general decorative scheme and architecture of the building in which they were installed, and to harmonize with one another, constituted an improvement to real property, and the designing, manufacturing, installing and furnishing thereof constituted the performance of labor, and the furnishing of materials for the improvement of real property within § 3 of the Lien Law. *Wahle-Phillips Co. v. West 59th St. Co.*, 153 A. D. 17, 138 N. Y. Supp. 13; *Wahle-Phillips Co. v. FitzGerald*, 146 N. Y. Supp. 562.

Where such fixtures were not specially designed for the building in which they were installed, and were such as might be obtained in the open market, it was held that the mere fact that they were connected with or

annexed to the building by screws or wires did not make them fixtures. *Caldwell v. Glazier*, 138 A. D. 826, 123 N. Y. Supp. 622.

§ 150. Grading

In the cases of *Raven v. Smith*, 24 N. Y. Supp. 601, 71 Hun 197, 148 N. Y. 415, and *Fredericks v. Goodman*, 29 N. Y. Supp. 1041, 75 Hun 612, under the statute of 1885, liens were sustained for grading. There the statute allowed a lien for "altering or repairing a building or building lot." Grading would not of itself be considered as a permanent improvement to real estate under the present statute, in consideration of the view of the statute taken by the court in *Thompson-Starett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128, where a lien was denied for the demolition of an old house on the theory that such labor did not permanently improve the property.

§ 151. Machinery.

In determining whether or not machinery installed is in the nature of a permanent improvement, the principles of the law of fixtures should be applied. Thus, in *Griffin v. Ernst*, 108 N. Y. Supp. 816, 124 A. D. 289, the defendant bought an old building and plaintiff furnished and put up second-hand machinery, which transformed the building into a manufactory. The lien was sustained. The intention to make the machinery a part of the realty and a permanent improvement was shown by the owner's purpose in using and considering the completed building in its entirety as a factory. The reasoning is similar to that in the case of *McCrea v. Central Bank of Troy*, 66 N. Y. 489; see § 143.

The court said:

"No extensive alterations were required for its

installation and no permanent foundations, piers or chimneys were required or constructed. It was attached to the floor, to the joists and to the beams of the ceiling by lag screws, and the evidence is overwhelming that such machinery so attached is often removed from the building and installed in others, as was in fact this machinery, and fairly supports the finding that the machinery here installed could be removed without injuring the building."

"At the same time it must be borne in mind that this machinery was furnished to the owner of this real property for his own use, for the purposes to which he designed the property, namely for the prosecution of the manufacturing business for which he had bought the property, and in which he was engaged. Before the installation of the machinery the building was a bare structure. After the installation it was a manufactory."

See also *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1; *Sears v. Wise*, 52 A. D. 118, 64 N. Y. Supp. 1063; *Nason Ice Machine Co. v. Upham*, 26 A. D. 420, 50 N. Y. Supp. 197.

§ 152. Mirrors.

In *Vogel v. Farrand*, 55 N. Y. Supp. 977, 26 Misc. 130, under the old statute it was decided that mirrors in frames which were easily removable, screwed to a hold-fast driven in a wooden block, three-quarters of an inch wide, inserted in a hole two and one-half inches deep bored into a wall previously constructed, were not the subject of a mechanic's lien.

See also *Ward v. Kilpatrick*, 85 N. Y. 413.

§ 153. Money loaned.

The statute does not give a lien for cash advanced to the contractor, even if the loan is arranged for in a

contract by which the performance of labor is provided for. *Uvalde Asphalt Co. v. City of New York*, 191 N. Y. 245.

§ 154. Sidewalks.

In *Kenny v. Apgar*, 93 N. Y. 539, decided under a former statute, it was held that the building of a sidewalk was such an improvement as would give the right to a lien. It would probably be so held under the present law.

§ 155. Tools and machines leased.

Tools which do not enter into the improvement are not materials for the furnishing of which a lien may be acquired. In the case of *Troy Public Works Co. v. City of Yonkers*, 68 Misc. 372, 124 N. Y. Supp. 307, 145 A. D. 527, 129 N. Y. Supp. 920, affirmed 207 N. Y. 81, the plaintiff sought to maintain a lien for the use of a steam shovel furnished to a contractor, without labor or maintenance. The lien was denied. The opinion read:

“The shovel was not material furnished to the contractor. ‘Material’ means ‘Matter which is intended to be used in the creation of a mechanical structure.’ It imports ‘the substance matter of which anything is made.’ (Webster’s Dict. quoted in Words & Phrases Judicially Defined.) To furnish material in such a case is to supply towards the making of the structure substance matter which may become a part thereof or may be assembled in it or may be assimilated with it or which is expended in the labor incident to such structure. But this shovel was a tool which, although used in the work, survived and remained the property of its owner, capable of use in other work.”

See also *Beals v. Fidelity & Deposit Co.*, 78 N. Y. Supp. 584, 76 A. D. 526, 178 N. Y. 581.

§ 156. Architect's and engineer's services.

The term labor includes skilled as well as unskilled labor and the statute protects all persons who perform labor.

“ The language of the statute makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs and applies the labor of others.” *Stryker v. Cassidy*, 76 N. Y. 50.

“ The general rule to be deduced from the adjudicated cases is that, while an architect is not entitled to a mechanic's lien for drawing plans alone, yet, when he both draws plans and superintends construction, he is entitled to a lien for the value of both plans and superintendence. In *Stryker v. Cassidy*, 76 N. Y. 50-53, 32 Am. Rep. 262, the Court of Appeals said:

“ ‘ An architect who makes the plans and supervises the erection of a building is within the words and reason of the law.’

“ The rule above stated is well illustrated by *Rinn v. Electric Power Company*, 3 A. D. 305, 38 N. Y. Supp. 345. In that case the architect had drawn plans for a large building, of which, however, only one-half had been erected under his superintendence. He was allowed a lien, in addition to his fees for superintendence, for one-half of the value of the plans which he had prepared for the whole building; the court remarking that an architect cannot have a lien for making plans alone, but when he makes the plans and supervises the construction, ‘ it is the part that the architect takes during the construction that draws his services within the lien law.’ In *Thompson-Starrett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128, the plaintiff was denied a lien for preparing plans because no building was erected. In the present

case the plaintiff not only drew plans, but superintended the construction." *Spannahke v. Mountain Const. Co.*, 144 N. Y. Supp. 968, 159 A. D. 727.

See also *Swasey v. Granite S. W. Co.*, 143 N. Y. Supp. 838, 158 A. D. 549.

Likewise a contractor is not entitled to a lien for the services of an engineer in making an examination of a site preparatory to the drawing of plans where the contract was immediately thereafter breached by the owner and the plans were never used and no construction work was done. *Thompson-Starett Co. v. Brooklyn Heights Realty Co.*, 111 A. D. 358, 98 N. Y. Supp. 128.

§ 157. Damages.

Damages for breach of contract cannot be recovered in an action brought to enforce a mechanic's lien. *Doll v. Coogan*, 62 N. Y. Supp. 627, 48 A. D. 121, 168 N. Y. 656; *Wolfe v. Horn*, 33 N. Y. Supp. 173, 12 Misc. 100; *O'Reilly v. Mahoney*, 108 N. Y. Supp. 54, 123 A. D. 275; *Paturzo v. Schuldiner*, 125 A. D. 636, 110 N. Y. Supp. 137.

CHAPTER ELEVEN.

PROCEEDINGS TO PERFECT LIEN.

§ 158. Notice of lien.

STATUTE.

“§ 9. Contents of notice of lien.

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or sub-contractor, the person with whom the contract was made.

4. The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a mis-description of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.”

§ 159. Object of notice.

The purpose of requiring the lienor to file a notice of his lien is to give a truthful statement of the facts upon which the lien is based, for the benefit of the court, the owner and any other claimants. *Foster v.*

Schneider, 2 N. Y. Supp. 875; *Gaskell v. Beard*, 11 N. Y. Supp. 399, 58 Hun, 101.

The lien dates from the time of the filing of the notice (§ 3, Statute).

“ The filing of the notice originates the lien. Anterior to this act the laborer or material man has no preferential right to be paid for his labor or material out of the sum which is due from the owner of the building to the contractor, but stands in the same position as other creditors.” *McCorkle v. Herrman*, 117 N. Y. 297.

See also *Stevens v. Ogden*, 130 N. Y. 182; *Tisdale Lumber Co. v. Read Realty Co.*, 154 A. D. 270, 138 N. Y. Supp. 829.

No penalty is provided in the statute for a failure to give a correct statement in the notice. But since the statute requires that the notice should be verified the courts have held that the requirements of § 9 must be substantially complied with in order to support the lien.

“ A mechanic’s lien never comes into existence unless the notice upon which it is founded substantially complies with the statute, which authorizes the creation of such liens.” *Toop v. Smith*, 181 N. Y. 283.

§ 160. Mistakes and wilfully false statements.

It seldom happens that the lienor states only the exact amount finally adjudged to be due him. The amount is generally made large enough to cover everything, because the recovery is limited to the amount claimed. *Morgan v. Taylor*, 5 N. Y. Supp. 920, 15 Daly 394, 128 N. Y. 622.

Nor need the amount due be stated with exactitude if by a mere mathematical calculation the exact amount due may be arrived at. *Hurley v. Tucker*, 198 N. Y.

534, 112 N. Y. Supp. 980, 128 A. D. 580; *Toop v. Smith*, 181 N. Y. 283.

Therefore, the mere fact that the quantity of material delivered, or the amount due, is incorrectly stated in the notice of lien will not of itself void the lien. An honest error in making the statement will not invalidate the notice.

“What the mechanic’s lien law requires is that a person shall truthfully state what portion of the work has been done and its value; and although a failure to comply with this provision of the statute is fatal to a lien, I do not think that an honest error of judgment, which results in a statement that the party making it believed to be true, will entirely destroy a lien which was good when filed, but is sought thereafter to be invalidated by facts showing that the person making the statement was mistaken because in error as to the true construction of the contract.” *Ringle v. Wallis Iron Works*, 24 N. Y. Supp. 757, 4 Misc. 15.

See also *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580, 198 N. Y. 534; *Goodrich v. Gillies*, 31 N. Y. Supp. 76, 82 Hun 18, affirmed 151 N. Y. 631; *Pierson v. Jackman*, 27 Misc. 425, 58 N. Y. Supp. 344; *Beattys v. Searles*, 77 N. Y. Supp. 497, 74 A. D. 214; *American Mortgage Co. v. Butler*, 73 N. Y. Supp. 334, 36 Misc. 253; *Pittsburgh Plate Glass Co. v. Vanderbilt*, 143 N. Y. Supp. 610.

It is only where the statement contained in the notice is wilfully and intentionally false in some important or material respect that the notice will be invalidated. Although this question had been previously determined by the lower courts, it first came directly before the Court of Appeals in the case of *Aeschlimann v. Presbyterian Hospital* (53 N. Y. Supp. 998, 29 A. D. 630), 165 N. Y. 296.

The court adopted the views expressed informally in the case of *Ringle v. Wallis Iron Works*, 149 N. Y. 439, (24 N. Y. Supp. 757, 4 Misc. 15, 28 N. Y. Supp. 107, 76 Hun 449) and laid down the rule that a party by inserting in a notice of lien statements of fact which are shown to be untrue, may thereby forfeit his right to a lien and render the notice void and ineffectual, provided it be shown that the statements are not only untrue, but wilfully and intentionally false in some important particular.

See also *Foster v. Schneider*, 2 N. Y. Supp. 875; *Close v. Clark*, 9 N. Y. Supp. 538, 16 Daly 91; *Gaskell v. Beard*, 11 N. Y. Supp. 399, 58 Hun 101; *Brandt v. Verdon*, 18 N. Y. Supp. 119; *Goodrich v. Gillies*, 21 N. Y. Supp. 400, 66 Hun 422; *Williams v. Daiker*, 68 N. Y. Supp. 348, 33 Misc. 70, 71 N. Y. Supp. 247, 63 A. D. 614; *Hall v. Thomas*, 111 N. Y. Supp. 979.

If the error is large, the intention to wilfully mislead may be inferred without positive proof of such intention.

In *New Jersey Steel & Iron Co. v. Robinson*, 83 N. Y. Supp. 450, 85 A. D. 512, the amount claimed due was exaggerated to the extent of over \$28,000.00. The court said:

“Such gross exaggeration must be regarded in law as wilfully made, as it must have been known to the lienors to be untrue at the time the statement was made.”

See also *Hecla Iron Works v. Hall*, 100 N. Y. Supp. 696, 115 A. D. 126; *Schreiber v. Stern*, 140 N. Y. Supp. 1094; *Romanik v. Rapoport*, 132 N. Y. Supp. 892, 148 A. D. 688.

One of the tests applied in determining the sufficiency of the notice is, whether or not the owner has been misled. *Bryson v. St. Helen*, 29 N. Y. Supp. 524,

79 Hun 167; *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580, 198 N. Y. 534. And in determining the sufficiency of a notice it must be read in its entirety. *Hunter v. Walter*, 12 N. Y. Supp. 60.

The question of sufficiency of the notice most often comes up in connection with the statements as to the materials furnished and the amount claimed to be due, and the citations given under that heading should be examined in connection with the topics just discussed. See § 164.

§ 161. More than one notice. Amendments.

A party may file notices of lien for installments due during the course of the work, and even though they expire by lapse of time he may then sue on a lien filed later for the full amount.

“There is no provision of the lien law which prevents a person furnishing materials or labor in the erection of a building from filing more than one lien on such property.” . . . “There is nothing in the statute which provides that successive liens may not be filed for the same work, or that a notice of lien filed upon the completion of the contract is void, because other notices of lien have been filed for a portion of the work done under the contract.” *Clark v. Heylman*, 80 N. Y. Supp. 794, 80 A. D. 572.

See also *Kerrigan v. Fielding*, 62 N. Y. Supp. 115, 47 A. D. 246; *Berger Mfg. Co. v. City of New York*, 206 N. Y. 24; *Strauchen v. Pace*, 195 N. Y. 167.

Errors in a notice may therefore be corrected by the filing of a second notice if it be filed within the statutory time.

After the expiration of the statutory period allowed for filing notices of lien, the court is without power to amend or reform a notice on motion. *Fish v. Anstey Const. Co.*, 130 N. Y. Supp. 927, 71 Misc. 2.

§ 162. Name and residence of lienor.

As used in the statute, the words "principal place of business" are synonymous with "principal office," and a notice filed by a corporation stating the place of "its principal office" will be sustained. *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580, affirmed 198 N. Y. 534.

In case the notice is filed by a partnership the notice must contain the names and residences of each partner. The business address of the partnership is insufficient. In *Kane v. Hutkoff*, 81 N. Y. Supp. 85, 81 A. D. 105, the court said:

"In this lien the name and residence of the lienors are stated as 'M. Kane & Son, 39 Perry Street.' M. Kane & Son was a co-partnership consisting of the plaintiffs. The names of the co-partners were not specified; nor does it appear that their residence was specified, the address given being the place of business of the co-partnership."

§ 163. Name of owner. (Subdivisions 2 and 7, § 9, of statute.)

The word "owner" is here used with the significance given it under § 2 of the statute. Under the provisions of § 9, no claim can be made against the interest of any one who is not named in the notice as an owner (subdivision 2). The effect of subdivisions 2 and 7 of § 9 is only: (1) to prevent an entire defeasance of the lien, because of the omission to name the owner in fee, (true owner) where the owner of a lesser estate is named; in which case the lien attaches to the extent of the interest of the person named as owner if he has any interest; and (2) to prevent a defeasance of the lien because of a misdescription of the owner whose interest is sought to be charged. And

the early cases which hold that the interest of any owner, whether in fee or otherwise, who is not named in the notice may nevertheless be charged with the lien, must be disregarded.

The proper interpretation of these sections is pointed out in the cases of *Strauchen v. Pace*, 195 N. Y. 167, and *DeKlyn v. Gould*, 165 N. Y. 282.

In the first of these cases the court said:

“ It was not the legislative intent to give a lien upon the property, through the filing of any notice describing it; it was intended that such a lien should be acquired as against the title, or interest, of the person, party to, or assenting to, the agreement under which the work was done, ‘ against whose interest therein a lien is claimed ’ in the notice. The proceeding in foreclosure is authorized, in order that the claim may be satisfied through a judicial sale of what title, or interest, the person named in the notice may have in the property. The object of the statute, to bind the interest of the person against whom the notice of lien is filed, appears in the requirement of the tenth section that the county clerk, in whose office the notice is to be filed, must enter in his docket, *inter alia*, the names of the owners stated in the notices in alphabetical order. This provision is to enable a search to bring out the persons whose interests are affected by the notice, and the docket, thus, gives the notice the law intended it should give. The second section does enlarge the term ‘ owner ’ when used, and a notice designating a person as such will be valid, even if the ownership be not of the fee, but that of some lesser estate, or of some contractual interest in the property. If the notice fails to state the name of the true owner, then the provision of the ninth section preserves the validity of the lien so far as the person named as

owner and against whom a lien is asked, in fact, may have some title, or interest. If this provision were to be construed as giving a lien against the unnamed owner of the fee, the construction would violate the plain legislative intent that the notice of lien should only affect the person whom the notice names, or attempts to name, as 'owner.' The statute requires the notice to state the name of the owner against whose interest a lien is claimed, which will include, *eo nomine*, one who has any of the estates mentioned in the second section, and that those names shall be entered in the 'lien docket.' In *Grippin v. Weed*, (22 A. D. 593, affirmed on opinion below, 165 N. Y. 612), the lien law of 1885 was under consideration and the construction was given that the statutory intent was to hold the interest of the person named in the notice of lien, although the interest was not correctly stated, and the name of the true owner was not inserted. The act of 1897, in the particular respect considered, is not, essentially, different in its provisions."

And in *DeKlyn v. Gould* the court said:

"The statute does not invite the suppression of names; it requires the expression of the names of those persons against whose interest a lien is claimed, but it also contemplates that some other name than that of the true person against whose interest a lien is claimed may be stated, and hence provides: 'But the failure to state the name of the true owner or contractor or a misdescription of the true owner shall not affect the validity of the lien.' The corporate name of the Simpson Company was 'Simpson's.' As the 'Simpson Company' was used, the statute undoubtedly cures the failure to use the true name 'Simpson's'; and this illustrates one phase of the meaning of the curative clause. If the referee had found that the lienor believed after due inquiry the

Simpson Company to be the true owner, the case would be different."

"In the connection in which the word 'failure' is used, it evidently means an unsuccessful attempt to name or designate the true owner, lessee, general assignee or person in possession of the premises against whose interest a lien is claimed. It does not mean that the lienor may name the lessee, as the true person against whose interest he claims a lien, and then afterwards proceed against the lessor, against whose interest he did not intend to file notice of a claim." Citing *Grippin v. Weed*, 22 A. D. 593, 48 N. Y. Supp. 112, 165 N. Y. 612.

See also *LaPasta v. Weil*, 46 N. Y. Supp. 275, 20 Misc. 554; *Fiske v. Rogers*, 18 N. Y. Supp. 191, 60 Super. 418; *Packard v. Sugarman*, 66 N. Y. Supp. 30, 31 Misc. 623; *Hall v. Thomas*, 111 N. Y. Supp. 979; *Fish v. Anstey Const. Co.*, 130 N. Y. Supp. 927, 71 Misc. 2.

But a statement to the effect that the owner's name is _____ or _____ has been held to be sufficient. *Abelman v. Myer*, 106 N. Y. Supp. 978, 122 A. D. 470.

Where the work has been done by a sub-contractor on properties owned by two different owners under contract with a single contractor, the notice must show the property owned by each, and the particular claim against each owner's property. A blanket lien will be held insufficient. *Leske v. Wolf*, 138 N. Y. Supp. 859, 154 A. D. 233.

§ 164. Labor performed, materials furnished and amount claimed.

The statute, (§ 9) says that the notice shall state:

"The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof."

This means that a lien may be acquired for either one, any or all of four different things:

- (1) labor already performed;
- (2) labor to be performed;
- (3) materials already furnished; and
- (4) materials to be furnished.

A lien on real property may be filed for the whole contract price before the work is done or the materials furnished, and recovery may be had for the amount due at the time of the trial. *Heinlein v. Murphy*, 22 N. Y. Supp. 713, 3 Misc. 47; *Johnson Service Co. v. Hildebrand*, 134 N. Y. Supp. 187, 149 A. D. 680; *Bulkley v. Kimball*, 19 N. Y. Supp. 672; *Ringle v. Wallis Iron Works*, 32 N. Y. Supp. 1011, 85 Hun 279, affirmed 155 N. Y. 674. (As to public improvement liens, see §§ 204 to 206.)

And where the notice does not cover the labor to be performed or material to be furnished, the lienor is not entitled to a lien for labor and materials furnished after the filing of the notice. *Hutton Bros. v. Gordon*. 23 N. Y. Supp. 770, 2 Misc. 267.

It therefore follows that a notice which merely follows the wording of the statute is insufficient. Such a statement would give no definite information as to the basis of the lien, and would be entirely unintelligible, and the authorities so hold. Thus, in the case of *New Jersey Steel and Iron Company v. Robinson*, 83 N. Y. Supp. 450, 85 A. D. 512, the notice read:

"The labor performed or to be performed is the cutting and setting of all the cut lime stone for the building on the premises and the materials furnished or to be furnished is the stone, so to be cut and set and the agreed price or value of such labor and materials is \$44,750.00."

The court in holding the notice was defective said:
"It is evident that the person who prepared this

notice followed the literal language of the statute, and made the statements in the alternative form of all of the particular things which the statute requires, and omitted to state the particular matter which the statute provides should be stated in the application of the facts out of which arises the lien. . . . An alternative statement is defective for the reason that it states neither one fact nor the other, and in effect operates as the exclusion of the statement of any fact."

See also *Bossert v. Happel*, 40 Misc. 569, 82 N. Y. Supp. 872, 89 A. D. 7, 85 N. Y. Supp. 308; *Bradley & Currier v. Pacheteau*, 75 N. Y. Supp. 531, 71 A. D. 148; *Finn v. Smith*, 186 N. Y. 465; *Romanick v. Rapaport*, 148 A. D. 668, 132 N. Y. Supp. 892.

But a notice which read, "The labor performed and to be performed, and the materials furnished and to be furnished, (is) all labor in, toward and about the brick-work for six buildings . . . and the agreed price and value is \$12,205.00," was sustained in the case of *Vitelli v. May*, 104 N. Y. Supp. 1082, 120 A. D. 448.

The court said the notice shows that the lien is for labor only, and the reference to materials is mere surplusage; the notice without any reference to materials would be good and cannot therefore be invalidated by mere surplusage.

A general statement of the claim is insufficient. The notice must be definite to the extent of showing the nature of the work performed and materials supplied. Thus, a notice which states the labor performed and material furnished as: "Under and by virtue of a contract with one _____ according to the specifications, etc., therein mentioned, on or about _____" is insufficient.

In *Toop v. Smith*, 84 N. Y. Supp. 326, 87 A. D. 241, (affirmed 181 N. Y. 283) the court said:

“ There is no direct mention of the character of the work or nature of the materials.”

If the plans and specifications had been annexed to the notice it would probably have been held sufficient.

See also *Armstrong v. Chisholm*, 91 N. Y. Supp. 693, 100 A. D. 440; *McKinney v. White*, 44 N. Y. Supp. 561, 15 A. D. 423, affirmed 162 N. Y. 601; *Norton & Gorman Const. Co. v. Unique Const. Co.*, 195 N. Y. 81, reversing 106 N. Y. Supp. 372, 121 A. D. 585; *Fanning v. Belle Terre*, 152 A. D. 718, 137 N. Y. Supp. 595; *Ball v. Doherty*, 144 A. D. 277, 128 N. Y. Supp. 1014; *Levin v. Hessberg*, 135 A. D. 155, 119 N. Y. Supp. 1021; *Martin v. DeCoppet*, 118 N. Y. Supp. 523, 64 Misc. 385.

A notice which includes materials not contracted for or used in the performance of the contract does not in the absence of fraud or bad faith invalidate the lien as to material actually contracted for. *Pierson v. Jackman*, 58 N. Y. Supp. 344, 27 Misc. 425.

A notice of a lien on six buildings, four of which are owned by one person and two by another, stating that the lienor has performed labor and furnished materials under a contract for the improvement of such real property to a specified value, and is to perform labor and furnish materials therefor of a specified value, is insufficient. The notice does not state how much labor has been expended and how much material has been furnished for the construction of the buildings upon either of the properties. Such a notice would prevent either owner from discharging the lien against his property unless he was willing to become surety for the entire contract price on all buildings. *Leske v. Wolf*, 138 N. Y. Supp. 859, 154 A. D. 233.

A notice which, after describing the work done under the contract, stated that “ he performed certain extra work in and about the building aforesaid and furnished

certain materials therefor," sufficiently states a claim for extra work. *Hunter v. Walter*, 12 N. Y. Supp. 60, affirmed 128 N. Y. 668.

Also a statement which claims for the "agreed price or value" is in the alternative, excludes both and is therefore defective. *Siegel v. Ehrshowsky*, 92 N. Y. Supp. 733, 46 Misc. 605; *Alexander v. Hollender*, 94 N. Y. Supp. 796, 106 A. D. 404; *Villaume v. Kirschner*, 85 N. Y. Supp. 377; *Riley v. Durfey*, 130 N. Y. Supp. 297, 145 A. D. 583; *Spring v. Collins Building & Const. Co.*, 60 Misc. 239, 113 N. Y. Supp. 29; *Martin v. Gavegan*, 95 N. Y. Supp. 14, 107 A. D. 279.

But the notice need not distinguish the amount claimed for labor from the amount claimed for materials, but only the amount claimed for labor and materials already furnished from the amount claimed for labor and materials to be furnished. *Woolf v. Schaefer*, 93 N. Y. Supp. 184, 103 A. D. 567; *Vitelli v. May*, 104 N. Y. Supp. 1082, 120 A. D. 448; *Martin v. Gavegan*, 95 N. Y. Supp. 14, 107 A. D. 279; *Flegenhauser v. Haas*, 108 N. Y. Supp. 476, 123 A. D. 75.

Performance in a notice of lien means substantial performance. *Ringle v. Wallis Iron Works*, 149 N. Y. 439; *Flegenhauser v. Haas*, 108 N. Y. Supp. 476, 123 A. D. 75; *Ansonia Brass & Copper Co. v. Gerlach*, 8 Misc. 256, 28 N. Y. Supp. 546; *Hall v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522.

§ 165. Time of first and last items.

The court, in the case of *Mahley v. German Bank*, 174 N. Y., at page 501, states that the "object of requiring this fact to be stated is not readily apparent." The reason for this requirement is to be found in § 13 of the statute, where it is provided that "liens shall also have priority over advances made upon a con-

tract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns, to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien.”

A failure to state the date when the first and last items of work were performed and materials furnished, or anything from which such time may be inferred, invalidates the notice. A liberal construction of the statute does not countenance the omission of something which the statute specifically requires. *Fenichel v. Zicherman*, 139 N. Y. Supp. 118, 154 A. D. 471; *Mahley v. German Bank*, 174 N. Y. 499.

But a statement that gives the time as “on or about” a certain date is sufficient. *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580, affirmed 198 N. Y. 534.

And if a date is incorrectly given, obviously from clerical error, the lien will not be thereby invalidated.

In *Schwartz v. Lewis*, 123 N. Y. Supp. 319, 138 A. D. 566, the complaint stated that on October 24, 1907, the plaintiff entered into a contract with the defendant Lewis to furnish certain plumbing and perform services; that between that date and January 28, 1908, the plaintiff performed his contract and that there remained due a balance of \$600.00 on the contract for which a lien was filed on April 18, 1908. Upon the trial the notice of lien was offered in evidence but the court refused to receive it on the ground that it stated that the last services were performed on January 28, 1907, instead of 1908, and that it therefore appeared on the face of the lien that it was not filed within 90 days of the completion of the work. The court said:

“The statute does not require that the notice of lien shall state that such period, (90 days) has not

elapsed. Strictly speaking it could not be done; for a notice of lien must be completed and verified before filing, and a considerable period of time might elapse after its verification and before its filing, which would not affect its validity if it was filed within the statutory period. It is necessary to state in the notice 'the time when the first and last items of the work were performed and materials furnished.' This notice of lien purported to state each of these dates. . . . Is the notice fatally defective because it states the last date as January 29, 1907, instead of January 29, 1908? We think not. . . . If the notice had contained no statement as to the date when the last material was furnished or the last labor performed it would have been invalid. But when it purports to state the date of furnishing the last item of work and material, if an unintentional error in stating such date is sufficient to vitiate the lien, then if this notice had inadvertently stated such date to be January 28, 1908, when as a matter of fact it was January 27th, of the same year, it would be bad. This is not the liberal **construction** which the statute contemplates. If by any fair construction the statement can be read so as to show the date intended and that date is substantially correct effect will be given to the notice."

The court then shows that since the date of the first item is correct, the January intended must have been that of 1908, since it was the only one which intervened between the date of the contract and the date of the action. Therefore the notice was sufficient as it would have been if it had given the name of the month and the date without any year whatever.

§ 166. Description.

The requirement as to the description of the property is that it shall be sufficient for the purposes of

identification by those interested in knowing what property is to be charged and where it is located. It is possible to identify property without knowing its exact dimensions. Such an identification must be possible by a reading of the notice and without extraneous evidence. The description need not therefore be so accurate and formal as is ordinarily incorporated in a deed. A more complete description may be incorporated in the notice of pendency of action and in the complaint, and if a more accurate description is necessary to enforce the judgment it may be made from the description in the notice.

It therefore follows that in cities and villages, where the property may be described by street numbers, the identification may be made complete without giving any dimensions. Thus, in *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580, the property was described as follows:

“A stable in the course of erection located upon the lots and parcels of land in the Borough of Manhattan, City, County and State of New York, known and described as Number 166 to 172 Perry Street.”

The court sustained the notice, saying that to anyone familiar with the locality there could be no doubt as to what property was intended, for there could be only one stable in the course of erection at the locality given.

In this case, in a later clause, the property was described as Ferry Street instead of Perry Street. The court said this was obviously a clerical error and one which would not mislead a person having knowledge of the premises.

In *Hall v. Thomas*, 111 N. Y. Supp. 979, the building was on a corner and was 25 feet wide. The notice gave it as 50 feet. There was but one building on the corner, and the court sustained the notice, saying:

“ The error of one dimension being too large has harmed neither the owner nor the other lienors, and does not invalidate the lien.”

But see *Sprickerhoff v. Gordon*, 105 N. Y. Supp. 586, 120 A. D. 748, where the property was described as

“ Situate on the southwest corner of Broome and Mangin Street, being about 25 feet and inches wide front and rear by about 75 feet and inches on each side and known as No. and shown on the following diagram.”

The lot upon which the building stood was actually 50 feet wide. The description was held to be insufficient, the court saying that it could not identify the property without extrinsic proof to such extent that the notice would have to be disregarded.

In *Krauss v. Brunett*, 130 N. Y. Supp. 1086, 73 Misc. 428, it was held that a description with reference to a particular map, giving the name of the highway and the side thereof upon which it was located, was sufficient, although it did not state the street number, it not appearing that the street was numbered.

See also *Walkham v. Henry*, 27 N. Y. Supp. 997, 7 Misc. 532.

§ 167. Signature and verification.

The notice need not be signed. The statute does not so require. *Moore v. McLaughlin*, 21 N. Y. Supp. 55, 66 Hun 133; *Reeves v. Seitz*, 62 N. Y. Supp. 101, 47 A. D. 267.

A verification is necessary because the statute so requires, and the statute furnishes the measure of what is required, and the statute is to be liberally construed. *Schwartz v. Allen*, 7 N. Y. Supp. 5; *Kealey v. Murray*, 15 N. Y. Supp. 403; *Chambers v. George Vassar's Sons*, 142 N. Y. Supp. 615, 81 Misc. 562; *Ward v. Kilpatrick*, 85 N. Y. 414.

A verification which follows the wording of the statute is sufficient. *Moore v. McLaughlin*, 21 N. Y. Supp. 55, 66 Hun 133; *Staubsandt v. Lennon*, 22 N. Y. Supp. 544, 3 Misc. 90.

.Where the name of the affiant was omitted, but he had signed and sworn to the verification, it was held to be a substantial compliance with the statute and sufficient. *Cunningham v. Doyle*, 25 N. Y. Supp. 476, 5 Misc. 219.

The verification need not be signed. *Reeves v. Seitz*, 62 N. Y. Supp. 101, 47 A. D. 267.

The fact that the verification is improper constitutes but an irregularity, and it may be waived by a failure to object to it. *Boyd v. Bassett*, 16 N. Y. Supp. 10.

The verification may be made by an agent. *Union Stove Works v. Klingman*, 46 N. Y. Supp. 721, 20 A. D. 449.

A notice signed by all claimants individually, although they have been doing business as partners, will be held sufficient, and the verification may be made by one partner only. *Waters v. Goldberg*, 108 N. Y. Supp. 992, 124 A. D. 511.

In *Kane v. Hutkoff*, 81 N. Y. Supp. 85, 81 A. D. 105, the verification was signed M. Kane & Son, with the signature of the notary public attached. The court held such a verification by a partnership was improper, saying:

“ It is quite clear that this is not a verification of the notice of lien. No person is described as being sworn, and no person signs the verification. It does not appear upon the face of it who it was that verified the notice. No one could be held for perjury if the notice of lien was untrue. M. Kane & Son, being a co-partnership, could not verify the notice. The statute requires that it should be done by the lienor or his

agent, and the provision of the statute was not therefore complied with.”

See also *Silleck v. Robinson*, 113 N. Y. Supp. 832, 60 Misc. 481; *Schenectady Const. Co. v. Schenectady Ry. Co.*, 94 N. Y. Supp. 401, 106 A. D. 336; *Cream City Furniture Co. v. Squier*, 21 N. Y. Supp. 972, 2 Misc. 438; *Sage v. Stafford*, 42 A. D. 449, 59 N. Y. Supp. 545; *Hine v. Vanderbeck*, 67 N. Y. Supp. 801, 56 A. D. 621.

§ 168. Filing and serving notice.

STATUTE.

“ § 10. Filing of notice.

The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within 90 days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the ‘lien docket,’ which shall be suitably ruled in columns headed ‘owners,’ ‘lienors,’ ‘property,’ ‘amount,’ ‘time of filing,’ ‘proceedings had,’ in each of which he shall enter the particulars of the notice properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.”

“ § 11. Service of copy of notice.

At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, if a natural person, by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said ser-

vice shall be made by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or by registered letter addressed to its last known place of business. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien." (Amended by Laws 1913, ch. 88. In effect March 20, 1913.)

§ 169. Filing of notice.

In the case of *McMahon v. Hodge*, 21 N. Y. Supp. 971, 2 Misc. 234, with reference to the time of filing the notice, the court says the act "requires that the notice of lien must be filed in the county clerk's office within ninety days after the completion of the contract, or the final performance of the work. If not filed within that time the claim is absolutely void. *Donaldson v. O'Connor*, 1 E. D. Smith 695; *Lutz v. Ely*, 3 E. D. Smith 621; *Hubbel v. Schreyer*, 14 Abb. Pr. (N. S.) 284; *Spencer v. Barnett*, 35 N. Y. 94. While the Mechanic's Lien Law makes benign provision for the payment of mechanics, material men and laborers, yet it is in derogation of the common law, and its provisions must be strictly complied with in order to be of avail to them. In this case the lien was not filed in time, and therefore the complaint should have been dismissed."

The statute does not mean that the claimants are limited to recover for such services as are performed or such materials as are delivered within the period of ninety days of the filing of the notice of lien, but that the lien for the balance due on the entire account may be filed within ninety days of the furnishing of the last item of the materials or the performance of the last item of labor. *Chambers v. George Vassar's Sons*,

142 N. Y. Supp. 615, 81 Misc. 562; *Lansberg & Co. v. Hein Const. Co.*, 135 A. D. 819, 120 N. Y. Supp. 190.

And the statute does not require the notice to state that ninety days have not elapsed since the completion of the work. *Schwartz v. Lewis*, 123 N. Y. Supp. 319, 138 A. D. 566.

If the clerk, in filing the lien, docketts it incorrectly, it appears that the claimant's rights are not thereby affected. In *Hurley v. Tucker*, 112 N. Y. Supp. 980, 128 A. D. 580 (affirmed 198 N. Y. 534), the court said:

“ The claimant's duty was performed when he filed the notice with the clerk, for the failure of a public official to perform his duty in filing a paper does not impair the rights of the individual who has properly delivered the paper to him or his authorized representative for such purposes.”

The time within which the notice may be filed begins to run from the date of the completion of the contract, and not from the date of its acceptance.

In *Milliken Bros. v. City of New York*, 201 N. Y. 65, the court said:

“ Though there are no decisions to be found in this state on the point, it seems to have arisen in several other states, and the authorities are uniform that the time to file a lien is to be reckoned from the date of the latest work under the contract, regardless of acceptance or occupation by the owner. (*Lichty v. Houston Lumber Co.*, 39 Colo. 53; *Washington Bridge Co. v. Land & River Imp. Co.*, 12 Wash. 272; *Cole v. Uhl*, 46 Conn. 296; *Nichols v. Culver*, 51 Conn. 177; *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546; *Coss v. McDonough*, 111 Cal. 662; *First Presby. Church v. Santy & Co.*, 52 Kan. 462.) ”

It should be noted that the court says “ latest work under the contract,” therefore, although after the com-

pletion of the contract work other work may be done on the property, the time to file a lien for the performance of the work under the contract cannot be thereby extended. *Kelly v. Merritt Co.*, 68 N. Y. Supp. 774.

The claimant must show that the last performance of labor or the last furnishing of materials from which the time is reckoned was under the contract. *Steuerwald v. Gill*, 83 N. Y. Supp. 396, 85 A. D. 605; *Mathiasen v. Barkin*, 70 N. Y. Supp. 770, 62 A. D. 614; *Silleck v. Robinson*, 113 N. Y. Supp. 832, 60 Misc. 481; *McLean v. Sandford*, 26 A. D. 603, 51 N. Y. Supp. 678.

When the contract is completed will depend somewhat upon the nature of the work and the wording of the contract, and the action of the parties themselves.

In *Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1, the work was the installation of certain machinery in such a way as to make it work satisfactorily. The court held that the time began to run from the date that the parties showed that they considered the contract completed, saying:

“The contract was to furnish, erect and adjust them all to each other in such a manner as to accomplish the desired end. This contract was not completed until all the machinery had been erected and ‘working satisfactorily.’ This result was not reached by the plaintiff until the 23d day of June, 1887.”

“The owner of the property, as well as the plaintiff, considered and treated the latter date as the time of the completion of the work contemplated by the contract, and the time from which the day of final settlement was to be computed, . . . and the plaintiff had ninety days thereafter within which to file the required notice.”

Even if a contract is substantially performed, the claimant's time to file a lien may not begin to run

until the contractor abandons the work as a completed contract. In *Milliken Bros. v. City of New York*, 201 N. Y. 65, the work was a public improvement, and the court says:

“ In the execution of a contract for the construction of a building or of a public improvement involving many details, there occurs a point at which performance is so nearly reached that were the work terminated recovery might be had by the contractor for substantial performance, abatement being made to the other party for deficiencies on the part of the contractor. In such a case, if the work under the contract terminated, it may very well be that the doctrine of substantial performance would apply and the improvement be deemed complete within the statute. But to hold that where the work is still proceeding, the acceptance of it in an incomplete state is sufficient to set running the time for filing liens would lead to unreasonable results. The work of a sub-contractor or the materials of a material man might not be done or furnished until after the lapse of thirty days from the acceptance of the work from the principal contractor, and neither would be entitled to file any lien.”

But see *Delany v. Carpenter*, 114 N. Y. Supp. 990, 42 Misc. 416.

When a contractor abandons a contract and the owner completes it, or if the contract is completed by the owner after the ejectment of the contractor, the work of completion by the owner is done for the contractor, and the time within which a notice of lien must be filed begins to run from the time of completion. It was so held in the case of a contract for a public improvement in *Baeder v. City of New York*, 101 N. Y. Supp. 351, 51 Misc. 358.

Where a lien and an assignment are filed on the

same day, in the absence of proof it will be assumed that the lien was filed first. *McDonald v. Ballston Spa*, 34 Misc. 496, 70 N. Y. Supp. 279.

On the question of proof of filing notice, see *Hunter v. Walter*, 12 N. Y. Supp. 60, affirmed 128 N. Y. 668.

§ 170. Service of notice.

It is not necessary to the validity of a lien that a copy thereof should be served on the owner. Service is necessary only to prevent payments by the owner to the contractor after the filing of the lien, to the prejudice of the lienor. *Kenny v. Apgar*, 93 N. Y. 539; *Hall v. Sheehan*, 69 N. Y. 618.

And even though no copy of the notice has been served, if the owner makes payment with knowledge that a lien has been filed he may be liable to the lienor to the extent of the payment in the event of a deficiency. *Kelly v. Bloomingdale*, 139 N. Y. 343.

Where a copy of the notice is served which is incomplete to the extent that neither the verification nor notice is signed, though the notice filed is signed, the service is sufficient, since the original need not be signed. *Reeves v. Seitz*, 47 A. D. 267, 62 N. Y. Supp. 101.

When the statute prescribes a method of service, that method must be strictly pursued. When the statute is silent as to the character of the service it must be personal. *In re Blumberg*, 133 N. Y. Supp. 774, 149 A. D. 303.

CHAPTER TWELVE.

OPERATION AND EFFECT OF LIEN.

§ 171. Extent of lien.

STATUTE.

§ 4. "Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided."

The right to a mechanic's lien is given by statute and not by contract. The lienor need have no direct contractual relations with the owner. But he must be able to trace his rights back through one who has contracted directly with an owner, and if he seeks a lien upon the interest of an owner who has not contracted for the improvement he must show that such owner has consented to the improvement. (See "Consent of Owner," § 135.) But since the owner's liability is limited by the statute to the amount remaining due and unpaid upon the contract between the owner and contractor at the time of the filing of the notice, and such amount as subsequently becomes due him by the terms of the contract, the extent of the lienor's rights

can only be determined by an examination of the contract, express or implied, under or through which the services were performed or the materials furnished.

The effect of the statute is simply to apply and apportion that amount in the manner provided, to those material men, laborers or other lienors who have complied with the provisions of the statute. Therefore, no matter what the status of the lienor may be as defined in § 2 of the statute, it is a prime essential to his right of lien, for him to show a performance of the contract between the contractor and an owner. And if other parties intervene between the lienor and the contractor, the lienor may also have to show the performance of the contract between such intervening party and the contractor.

In determining whether or not the contract has been performed, the principles of contract law are to be applied as hereinbefore set forth. Reference should be made to the following chapters:

“Performance in General,” Chapter Two; “Time of Performance,” Chapter Four; “Certificates and Arbitration,” Chapter Five; “Extra Work and Specifications,” Chapter Six.

§ 172. Right to demand contract.

And since the rights of lienors are dependent upon the terms of the contract between the owner and contractor, provision has been made in § 8 of the statute to enable those interested to learn the terms of such contract.

STATUTE.

“§ 8. Terms of contract may be demanded.

A statement of the terms of a contract pursuant to which an improvement of real property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly

authorized agent, to a sub-contractor, laborer or material man performing labor for or furnishing materials to a contractor, his agent or sub-contractor, under such contract. If, upon such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a sub-contractor, laborer or material man has not been paid the amount of his claim against a contractor or sub-contractor, under such contract, and a judgment has been obtained and execution issued against such contractor or sub-contractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such sub-contractor, laborer or material man, filed as prescribed in this article, against the real property improved, for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner."

In the case of *Lumbard v. Syracuse B. & N. Y. R. R.*, 55 N. Y. 491, the court said:

"A party furnishing materials or doing work, relying upon the lien given by statute for security, must examine the contract with the owner; for it is only to the extent of what is due or to become due upon this contract that his lien can attach. If he furnishes the material or does the work for a sub-contractor in like reliance, he should not only examine the contract with the owner, but also that of the sub-contractor; for if the sub-contractor fails to perform his contract so that nothing becomes payable thereon, or is paid in full according to its terms in case of performance, there can be no lien within the principle of *Carman v. McCrow*, 13 N. Y. 70. There is no reason for protecting an owner against a lien who has paid the contractor on full performance pursuant to the contract, not equally applicable to a contractor who in like manner has paid his sub-contractor. It would be equally unjust to compel a contractor to pay again through the enforcement of a lien as it would an owner."

If an owner and contractor prepare a written con-

tract naming an amount in excess of the real contract price for the purpose of deceiving the maker of a loan, and a material man, relying upon such contract, furnishes materials, upon action by the material man to foreclose his lien, the owner cannot urge as a defense that there was a secret agreement between him and the contractor whereby the real contract price was to be smaller. To permit such a defense would defeat the entire purpose of the Lien Law. *Hitchings v. Teague*, 99 N. Y. Supp. 967, 113 A. D. 670.

See also *Larkin v. McMullin*, 120 N. Y. 206; *Smack v. Cathedral of Incarnation*, 52 N. Y. Supp. 168, 31 A. D. 559; *Upson v. United Eng. & Cont. Co.*, 130 N. Y. Supp. 726, 72 Misc. 541.

And the statute does not limit the right to demand the terms of the contract to one such demand. The interested parties have the right to be kept informed as to the condition of the contract throughout the entire time of its performance, and as to the condition of the account between the contracting parties. *Glens Falls Co. v. Schenectady Coal Co.*, 144 N. Y. Supp. 519.

§ 173. Extent of owner's liability.

The lienor must prove that there was an unpaid balance due on the principal contract when the lien was filed, or that something subsequently became due thereon to which the lien can attach. *Madden v. Lennon*, 52 N. Y. Supp. 8, 23 Misc. 704; *LaPasta v. Weil*, 46 N. Y. Supp. 275, 20 Misc. 554; *Miller v. Smith*, 47 N. Y. Supp. 49, 20 A. D. 507; *Ball v. Wood*, 52 N. Y. Supp. 443, 31 A. D. 356; *Person v. Stoll*, 72 A. D. 141, 76 N. Y. Supp. 325; *Manelly v. City of New York*, 119 A. D. 376, 105 N. Y. Supp. 976; *Crane v. Genin*, 60 N. Y. 127; *Brainard v. County of Kings*, 155 N. Y. 538; *Craig v. Blake*, 58 N. Y. Supp. 330, 27 Misc. 546; *Gass v.*

Souther, 61 N. Y. Supp. 305, 46 A. D. 256, affirmed 167 N. Y. 604; *Gribben v. Hoare*, 104 N. Y. Supp. 445; *Laudani v. Vulcan Eng. Co.*, 128 N. Y. Supp. 922, 70 Misc. 385; *Murphy v. City of Watertown*, 112 A. D. 670, 99 N. Y. Supp. 6; *Mason's Supplies Co. v. Jones*, 58 A. D. 231, 68 N. Y. Supp. 806, 172 N. Y. 598.

The owner cannot be charged for more than the contract price between himself and the contractor, even though the latter has obligated himself to a sub-contractor in an amount in excess of that price. *Regen v. Borst*, 32 N. Y. Supp. 810, 11 Misc. 92.

But § 4 of the statute was not intended to absolve the owner from paying interest upon a liquidated and valid debt when due. It was meant to limit the owner's liability to all lienors, to the sum for which he could be made liable under the original contract. That sum includes interest from the date when it is due and payable. *Hedden Const. Co. v. Proctor-Gamble Co.*, 62 Misc. 129, 114 N. Y. Supp. 1103.

§ 174. Abandonment and ejectment.

In case the contractor abandons the contract, and there is no provision for a completion of the work by the owner, or if there is such a provision, but the owner elects to consider the contract as forfeited, the contractor can acquire no lien because nothing remains unpaid to which the lien may attach. This is true even if the work is completed for less than the contract price. *Larkin v. McMullin*, 120 N. Y. 206; *DeLorenzo v. Von Roitz*, 60 N. Y. Supp. 736, 44 A. D. 329; *Dennison Cont. Co. v. Mannes Schmidt*, 129 A. D. 600, 113 N. Y. Supp. 1071, affirmed 204 N. Y. 404.

Where the owner has the election either to go on and complete the work under the contract or to consider it forfeited, he must make his election to forfeit

clear, as he will be presumed otherwise to have completed the work under the contract, and the lien will attach to any balance remaining over the contract price. *Fraenkel v. Friedman*, 199 N. Y. 351; *White v. Livingston*, 69 A. D. 361, 75 N. Y. Supp. 466, affirmed 174 N. Y. 538; *Ogden v. Alexander*, 140 N. Y. 356.

Where there is a provision in the contract that a percentage of the payment shall be reserved and shall not become due until completion and acceptance, the lien does not attach until the completion of the work. The rule is the same as where the payment is not to become due until a certificate is obtained. *Brainard v. County of Kings*, 155 N. Y. 538; *Kelly v. Bloomingdale*, 139 N. Y. 343.

Where there is a provision in the contract permitting the owner to eject the contractor and complete the work, and pay to the contractor the balance, if any, remaining after such completion, the lien attaches only to such balance, if any. The rules are thus stated in *Van Clief v. Van Vechten*, 130 N. Y. 571.

“ 1. If anything is due to the contractor, pursuant to the terms of the contract, when the lien is filed it attaches to that extent.

2. If nothing is due to the contractor, according to the contract, when the lien is filed, but a certain amount subsequently becomes due thereunder, the lien attaches to the extent of that sum.

3. If nothing is due to the contractor pursuant to the contract when the lien is filed and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed.”

Citing *Larkin v. McMullin*, 120 N. Y. 206; *Powers v. City of Yonkers*, 114 N. Y. 145; *Mayor v. Crawford*, 111 N. Y. 638; *Graf v. Cunningham*, 109 N. Y. 369; *Taylor v. Mayor*, 83 N. Y. 625; *Heckman v. Pinkney*, 81 N. Y. 211; *Gibson v. Lenane*, 94 N. Y. 183; *Rodbourn v. Seneca Lake Grape Wine Co.*, 67 N. Y. 215; *Lombard v. Syracuse Ry.*, 55 N. Y. 491.

When, after the abandonment of a contract, the surety completes the same after taking an assignment of the contractor's uncompleted contract, lienors claiming against the contractor are entitled to any balance due from the owner after completion. The surety does not become an independent contractor so as to be himself entitled to a lien. When the surety undertakes the completion of a contract, his rights are measured by those of the contractor.

“ When the surety elected to complete the contract it took the place of the contractor. The law is not that it thereby only took the possible benefits of that position. Its position was no different to that of an assignee of the contract. Such an assignee would take subject to all prior mechanics' liens; and so did the surety. The surety as well as the contractor was primarily bound from the beginning to complete the contract. Every person who furnished work or material to the contractor did so in view of this, and of the legal right and possibility of the surety electing to go on with the contract if the contractor failed. If the surety had refused to do so, the lien of the existing mechanics' liens would thereby have been limited to any amount due to the contractor when he abandoned the work; but on electing to complete the contract the surety could not evade such liens; they continued valid against every installment to come due on the contract, the same as though the contractor had

not failed. Such liens, as soon as filed, were equally valid against the contractor and the surety. Each of them had the right to carry out the contract, and it mattered not to the lienors which should do so. The contract was in fact carried out and completed. That the first half of it was done by the contractor and the second half by the surety is of no more concern to the lienors than if the first half had been done by the surety and the second half by the contractor, or all of it had been done by the surety or by the contractor, or they had done it together. They were each primarily bound by the contract from the beginning that the work would be done. Brandt, Sur., § 1; Baylies, Sur. 134, § 2. The plaintiff and the other lienors did work and furnished material with that in view, and under the Lien Law and for the purpose of their liens they were as much in privity with the surety as with the principal."

"The sole question is whether this surety who was by the contract liable with the contractor from the beginning for the carrying out of the contract, and who elected to and did complete the contract, as he had the right to do, does not stand in the same relation to prior liens as though he were the contractor. The contention on behalf of this surety defendant is that such a surety may step in clear of all previous liens or claims at whatever point the contractor may abandon the contract, and complete it. If this be so, contractors and sureties have a plain and sure way of colluding to swindle which has not hitherto been resorted to only because it has not been deemed to exist." *Harley v. Mapes Reeve Const. Co.*, 68 N. Y. Supp. 191, 33 Misc. 626.

See also *Smith v. Lange*, 81 A. D. 192, 80 N. Y. Supp. 1078; *Martin v. Flahive*, 112 A. D. 347, 98 N. Y. Supp.

577; *C. T. Willard Co. v. City of New York*, 142 N. Y. Supp. 11, 81 Misc. 48; *Hutton Bros. v. Gordon*, 23 N. Y. Supp. 770, 2 Misc. 267; *Schmohl v. O'Brien*, 55 N. Y. Supp. 629, 25 Misc. 699; *Hall v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522; *Campbell v. Coon*, 149 N. Y. 556; *Mack v. Colleran*, 136 N. Y. 617; *Dyer v. Osborne*, 58 N. Y. Supp. 1123, 28 Misc. 234; *Tisdale Lumber Co. v. Droge*, 131 N. Y. Supp. 683, 147 A. D. 55.

§ 175. Sub-contractors.

A sub-contractor seeking to enforce a lien against real property must show that there is a balance due from the owner to the original contractor, to which the lien may attach. Likewise, one furnishing materials to or performing services for a sub-contractor can only enforce a lien to the extent of the moneys due from the contractor to the sub-contractor. The lien does not attach to additional sums due from the owner to the contractor which are not payable to the sub-contractor. *Crane v. Genin*, 60 N. Y. 127; *Wright v. Schoharie Valley Ry. Co.*, 116 A. D. 542, 101 N. Y. Supp. 801, 191 N. Y. 549; *French v. Bauer*, 134 N. Y. 548; *Lombard v. Syracuse B. & N. Y. R. R.*, 55 N. Y. 491; *Wexler v. Rust*, 128 N. Y. Supp. 977, 144 A. D. 296; *Upson v. United Engineering & Cont. Co.*, 130 N. Y. Supp. 726, 72 Misc. 541; *Blakeslee v. Fisher*, 21 N. Y. Supp. 217, 66 Hun 261.

But the sub-contractor is entitled to a lien on all that is due from the owner to the contractor at the time of the filing of the lien, and if the contractor later defaults the owner cannot counterclaim against the amount due at the time of filing the lien, the default being subsequent to such time. The amount to which the lien may attach may be increased after the time of filing, but it can never become less than the amount due at such

time. *Anisanel v. Coggeshall*, 83 A. D. 491, 82 N. Y. Supp. 430; *Foshay v. Robinson*, 137 N. Y. 134.

And a sub-contractor may have a lien on moneys due from the owner to the contractor for extra work. *Blakeslee v. Fisher*, 21 N. Y. Supp. 217, 66 Hun 261; *Otis Elevator Co. v. Dusenbury*, 95 N. Y. Supp. 959, 47 Misc. 450.

When a material man furnishes materials to a sub-contractor, who thereafter defaults, and all parties concerned agree that the original contractors should continue the work and use such material, the right of lien of the material man is continued on the money to become due on the sub-contract, as if the same had been completed by the sub-contractor. And the fact that the original contractors thereafter default, and the work is completed by the owner, does not affect the lien of such material man upon any surplus remaining in the owner's hands after the completion. The legal effect is the same as if there were a provision in the contract permitting the owners to complete the contract and they had acted upon it. *Martin v. Flahive*, 98 N. Y. Supp. 577, 112 A. D. 347.

If an owner agrees with a sub-contractor that he will not reduce the amount due to the principal contractor by claiming liquidated damages for delay in the performance of the contract, the owner is precluded from asserting any claim for such damages against the lien of such sub-contractor. Such an agreement will also enure to the benefit of those lienors who claim through such sub-contractor. *Schloss v. Troman*, 139 N. Y. Supp. 616, 154 A. D. 645.

As to claims of joint and several contractors, see *Pell v. Baur*, 133 N. Y. 377; *Stroebel v. Ochse*, 14 Misc. 522, 35 N. Y. Supp. 1089.

As to the effect of an assignment by the owner of his interest in the property, see §§ 178 and 182.

§ 176. Entire and several contracts.

In determining what amount is due to which a lien may attach, it may become important to consider whether the contract is entire or several. (See "Entire and Divisible Contracts," § 44.) In a severable contract the owner may be liable to lienors in spite of the fact that after a default by the contractor he has expended more than the contract price in completing the entire work, if those parts against which the liens are claimed have been completed for less than the contract price. *White v. Livingston*, 69 A. D. 361, 75 N. Y. Supp. 466, affirmed 174 N. Y. 538.

Likewise, where the contract provides for installment payments, a sub-contractor or one claiming through him, may be entitled to a lien upon an installment, although the contractor might not be so entitled because of a default subsequent to the filing of the sub-contractor's lien, which would impose an expense for completion upon the owner in excess of the entire contract price. When the installment payment becomes due the sub-contractor's lien attaches at once. *Foshay v. Robinson*, 137 N. Y. 134.

§ 177. Collusive payments.

STATUTE.

"§ 7. Liability of owner for advance payments, collusive mortgages and incumbrances.

Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a sub-contractor, laborer or material man under such contract, created before such payment actually becomes due. A mortgage, lien or incumbrance made by an owner of real property, for the purpose of avoiding the provisions of this article, with the knowledge or privity of the person in whose favor the mortgage, lien or incumbrance is created, shall be void and of no effect as against a claim on account

of the improvement of such real property, existing at the time of the creation of such mortgage, lien or incumbrance."

The statute does not prohibit the making of any payments in advance of the time fixed in the contract, but only such payments as are made collusively, for the purpose of avoiding the provisions of the statute and defeating the lien of the sub-contractor, laborer or material man. Advance payments are often beneficial to those employed by the contractor, as they enable the work to proceed. *Lind v. Braender*, 7 N. Y. Supp. 664, 15 Daly 370; *Tommasi v. Bolger*, 100 N. Y. Supp. 367, 114 A. D. 838; *Wolf v. Mendelsohn*, 87 N. Y. Supp. 465; *Robbins v. Arendt*, 148 N. Y. 673; *Drall v. Gordon*, 101 N. Y. Supp. 171, 51 Misc. 618.

Collusion must be proved by the lienor who is seeking to charge the owner therewith, since payments made without notice of the lien, actual or constructive, will be credited to the owner, even though the owner have knowledge of the indebtedness from the contractor to the sub-contractor. *Miller v. Smith*, 47 N. Y. Supp. 49, 20 A. D. 507; *Wagner v. Butler*, 140 N. Y. Supp. 50, 155 A. D. 425; *Smack v. Cathedral of Incarnation*, 52 N. Y. Supp. 168, 31 A. D. 559; *Behrer v. City & Suburban Homes Co.*, 100 N. Y. Supp. 35, 114 A. D. 450, affirmed 191 N. Y. 530; *Snyder v. Monroe-Eckstein Brewing Co.*, 95 N. Y. Supp. 144, 107 A. D. 328; *Hudson River Bluestone Co. v. Huntington*, 143 A. D. 99, 128 N. Y. Supp. 25; *Rosenbaum v. Paletz*, 114 N. Y. Supp. 802.

It was, however, held, in *Glens Falls Co. v. Schenectady Coal Co.*, 144 N. Y. Supp. 519, that advance payments made with knowledge of outstanding claims are collusive. The court allowed the plaintiff's lien to the extent of the amount due at the time the payment was made, but denied a lien for what became due there-

after. Since, however, the plaintiff had knowledge that the payment was to be made in ample time to file a notice of lien which would have fully protected it, the decision is open to question. The plaintiff was negligent in protecting its interests.

The provision of the statute with reference to advance payments applies to payments by a contractor as well as to those by an owner. *Smack v. Cathedral of Incarnation*, 52 N. Y. Supp. 168, 31 A. D. 559; *Lawrence v. Sawson*, 54 N. Y. Supp. 647, 34 A. D. 211, 64 N. Y. Supp. 185, 50 A. D. 570; *French v. Bauer*, 134 N. Y. 548.

Where an owner gives the contractor a mortgage on the premises as security for the payment of the contract price and not in payment thereof, if a lien is filed before the mortgage is paid it will attach to the balance due thereon, even though the mortgage is assigned, unless the principal debt is assigned by the contractor with the mortgage. *Gass v. Souther*, 61 N. Y. Supp. 305, 46 A. D. 256, 167 N. Y. 604.

Where the holder of a mortgage on a tract of land releases it and takes new mortgages for the same indebtedness from purchasers of the tract, such new mortgages being on lots into which the tract is subdivided and being expressed to be purchase money mortgages, there is a mere substitution of securities, and the new mortgages have the same priority over mechanics' liens as the original mortgage. *Fish v. Anstey Const. Co.*, 130 N. Y. Supp. 927, 71 Misc. 2.

Where a contract specifically provides for payment by notes secured by a mortgage on the premises, in the absence of fraud the notes will be considered as payment. *Rosenbaum v. Paletz*, 114 N. Y. Supp. 802.

One who takes an assignment of mortgage takes it not only subject to any latent equities that exist in

favor of the mortgagor, but also subject to any like equities in favor of third persons. A mortgage executed for the purpose of raising money thereon for the mortgagor, and without any delivery to or consideration being paid therefor by the mortgagee, has life and validity only from the time of its assignment and delivery to an assignee for value, and this transaction cannot have a retroactive operation so as to give effect to the mortgage at an earlier date, to the prejudice of others having rights, legal or equitable, existing at the time. Where such a mortgage is executed and recorded and subsequently sold, but before its assignment and delivery another person acquires a lien upon the property, the lienor has priority. *Schaefer v. Reilly*, 50 N. Y. 61.

§ 178. Conveyances.

Where the right to a lien exists a conveyance of the property by the owner will not defeat the lien if it happens that the conveyance was not *bona fide*. *N. Y. Lumber Co. v. 73rd St. Bldg. Co.*, 5 A. D. 87, 38 N. Y. Supp. 869; *Parsons v. Moses*, 40 A. D. 58, 57 N. Y. Supp. 727.

Whether the conveyance was made in good faith is a question of fact. *Linneman v. Bieber*, 85 Hun 477, 33 N. Y. Supp. 129.

§ 179. Priorities.

STATUTE.

“ § 13. Priority of liens.

A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien; over advances made upon any mortgage or other incumbrance thereon after such filing; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a

general assignment for the benefit of creditors, within thirty days before the filing of such notice. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used. Persons standing in equal degrees as co-laborers or material men, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article, without reference to the time when such laborers shall have filed their notices of liens."

" § 56. Preference over contractors.

When a laborer or a material man shall perform labor or furnish materials for an improvement of real property for which he is entitled to a mechanic's lien, the amount due to him shall be paid out of the proceeds of the sale of such property under any judgment rendered pursuant to this article, in the order of priority of his lien, before any part of such proceeds is paid to a contractor or sub-contractor. If several notices of lien are filed for the same claim, as where the contractor has filed a notice of lien, for the services of his workmen, and the workmen have also filed notices of lien, the judgment shall provide for but one payment of the claim which shall be paid to the parties entitled thereto in the order of priority. Payment voluntarily made upon any claim filed as a lien shall not impair or diminish the lien of any person except the person to whom the payment was made."

§ 180. Unrecorded claims.

The meaning of the statute in so far as it gives lienors preference over conveyances, judgments or other claims not recorded is explained in *Vogel and Binder v. Evans*, 118 N. Y. Supp. 10, 133 A. D. 836. There certain lienors who had filed notices against the owners of record (Harris and Hooker) subsequent to the filing of notices by others against an owner by an unrecorded deed in actual possession, (The Genesee Amusement Company) claimed a preference under § 13. The court said in discussing the statute:

“ It would seem that the underlying purpose of this provision was to relieve the lienor from the possible result of having his lien, otherwise perfect, as a claim upon the real estate it describes made ineffectual by some secret transfer or other incumbrance upon the property, which was asserted to prevent the lien's attaching to the property, or reducing its value or extent. It should be borne in mind that appellants' liens attached to the interest of the Genesee Amusement Company in the property, whose title was as to ‘ all the world.’ that of an owner of the fee. Record of its deed was not necessary for the purpose of giving notice as to it of the title it claimed and had. Appellants' liens attached to that title. Their liens were duly filed. It is only as to conveyances, judgments, or other claims, not recorded, docketed or filed, that the statute in terms applies to subordinate them to subsequent liens properly filed against the property. Any purchaser or mortgagor of the premises taking title from the amusement company would be bound by these notices of lien. We think the same reason applies for holding the respondents bound to recognize appellants' liens, not only as prior in time, but prior in right. To adopt respondents' construction of the statute would lead to results which we cannot believe it should be held the statute permits. For instance, if respondent's position is correct, all of these lienors might have filed their claims against Harris and Hooker alone. The Genesee Amusement Company, the real owner, with whom alone the contract for the erection of the building was made, not having notice of the liens, might have paid to the contractors the full contract price for the building and then be required to pay in addition the full amount of the liens. We cannot accept a construction of the statute which necessarily permits such a possibility.”

See also § 178, "Conveyances," and § 177, with reference to "Mortgages."

§ 181. Lienors and general creditors.

The filing of the notice institutes the lien. Until then a lienor has no preferential right, but stands in the same position as other creditors. If prior to the filing of the notice another creditor has acquired a legal or equitable right to have the debt applied in satisfaction of his claim, such right is not overreached by liens subsequently filed, except where priority is given by the statute. There is no provision in the statute forbidding a contractor to pay his creditors out of money due or to become due from the owner to the exclusion of laborers and material men who do not file liens. Therefore, as between a receiver in supplementary proceedings against the contractor and a lienor who filed his lien after the commencement of the proceedings, the title of the latter antedates the lien and has prior right to the debt. *McCorkell v. Hermann*, 117 N. Y. 297; *Smith v. Pierce*, 60 N. Y. Supp. 1011, 45 A. D. 628; *McDonald v. Village of Ballston Spa*, 70 N. Y. Supp. 279, 34 Misc. 496.

§ 182. General assignments.

Under a general assignment for the benefit of creditors by a contractor the assignee takes title subject to liens filed by laborers, material men or sub-contractors subsequent to the assignment but within the time prescribed by the statute. A different rule of course applies where the assignment has been for a valuable consideration. In the latter case, if the statute is complied with and the assignment duly recorded, the liens are subject to the assignment. *Kane v. Kinney*, 174 N. Y. 69; *Parsons v. Curran*, 149 A. D. 762, 134 N. Y. Supp. 101.

Where the general assignment is by the owner, the preference of the lienor is preserved over the claims of general creditors who have not furnished material or performed labor upon such property, provided the notice of lien is filed within thirty days after the date of such assignment (§ 13 of statute). It is provided in § 4 of the statute (see § 171 of text) that in the event of such general assignment by the owner, the lien shall extend to the interest so assigned. Nothing is there stated as to the limitation of the lienor's preference to creditors other than those who have furnished materials or performed labor. While these two sections are therefore to a certain extent contradictory, since the object of § 13 is to set forth the rights as to priority of the various claimants, the limitations of § 13 as to the lienors' rights will probably be held to be controlling.

§ 183. Bankruptcy.

A lien acquired before the adjudication of the contractor as a bankrupt is valid against the trustee in bankruptcy, even though it is not filed until after the adjudication. *Crane v. Pneumatic Signal Co.*, 94 A. D. 53, 87 N. Y. Supp. 917, affirmed 182 N. Y. 545; *Hildreth v. City of Watervliet*, 146 N. Y. Supp. 449, reversing 82 Misc. 243, 143 N. Y. Supp. 867, 31 Am. B. R. 703, reversing 30 Am. B. R. 789.

But such preference will be waived by the filing of a proof of claim by the lienor, and participation in the business at a meeting of the creditors. *Brown v. City Nat'l Bank*, 131 N. Y. Supp. 92, 72 Misc. 201, 26 Am. B. R. 638.

§ 184. Liens and attachments.

The distinction between the rights of a lienor and an attaching creditor is pointed out in the case of *Her-*

mann & Grace v. City of New York, 130 A. D. 531, 114 N. Y. Supp. 1107, affirmed 199 N. Y. 600, as follows:

“A mechanic’s lien attaches primarily to whatever may be due to the contractor when the lien is filed. If nothing is due then, or if the amount due is insufficient to meet the lien, it attaches to any amount which may subsequently become due under the contract. An attachment, on the other hand, applies only to an amount which has become an indebtedness to the defendant, whose property was attached, at the time of the levy, and not to an indebtedness which may accrue after the levy of the attachment.”

Therefore, where the sums due to a contractor at the time of the levy are already subject to prior mechanic’s liens, there is nothing subject to the levy. The lien will not be subordinated to the attachment with the hope that some further sum may become due to the contractor thereafter, to which the lien may attach.

See also *Hermann & Grace v. City of New York*, 120 N. Y. Supp. 146, 136 A. D. 28.

§ 185. Preferences.

Lienors standing in equal degrees have priority according to the dates of filing their respective liens. But a preference is given to laborers for daily or weekly wages. Section 13, statute. See also § 9, Labor Law.

But “this preference exists only as to the time of filing among those who have filed liens within the purview of the law, and does not relate back to the time when the services were rendered or the materials furnished.” *Riverside Const. Co. v. City of New York*, N. Y. Law Journal, December 23, 1913.

See also *Hall v. Thomas*, 111 N. Y. Supp. 979; *Willard v. City of New York*, 142 N. Y. Supp. 11, 81 Misc. 48.

By § 56 material men and laborers are now included in the favored class and are awarded a preference over other lienors irrespective of the date of the filing of the liens. A material man must always claim through a sub-contractor (see definitions). The amount of his recovery is therefore limited by the amount due to the sub-contractor. Where the laborer claims through a sub-contractor his recovery is likewise limited. *Jackson v. Egan*, 200 N. Y. 496.

See also *Hedden Const. Co. v. Proctor & Gamble*, 62 Misc. 129, 114 N. Y. Supp. 1103; *Reeves v. Seitz*, 47 A. D. 267, 62 N. Y. Supp. 101.

See also "Assignments," §§ 244 to 251.

With reference to liens on "Several Buildings," see § 142.

§ 186. Building loans contracts.

STATUTE.

"§ 22. Building loan contract.

A contract for a building loan, either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and within ten days after its execution be filed in the office of the clerk of the county in which any part of the land is situated, and the same shall not be filed in the register's office of any county. If not so filed the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. A modification of such contract shall not affect or impair the right or interest of a person, who, previous to the filing of such modification, had furnished or contracted to furnish materials, or had performed or contracted to perform labor for the improvement of real property, but such right or interest shall be determined by the original contract. The county clerk is entitled to a fee of twenty cents for filing such a contract or modification. Such contracts and modifications thereof shall be indexed in a book provided for that purpose, in the alphabetical order of the names of the persons to whom such loans shall be made."

See also § 13 at § 179 of text.

In the case of *Penn. Steel Co. v. Title Guarantee and Trust Co.*, 100 N. Y. Supp. 299, 50 Misc. 51, the purpose of the statute is stated to be as follows:

“ The statute is a safeguard against secret arrangements between the lender and owner or contractor. It commands that all agreements or modifications thereof be filed. The object is to acquaint the material man with the exact amount of money to be advanced, the purpose to which it is to be applied, and the times when or stages of construction at which advances are to be made. In the terms of the agreement is he to find a guide to his dealings with the owner or contractor. Therefore the agreement filed should be a true agreement. Nothing should be left to conjecture. The material man is not called upon to inquire beyond the actual terms of the filed instrument. The agreement is his source of information, the statute his protection. In the event of failure to comply with the statute, the interest in the real property of each party to the agreement is subjected to the lien and claim of the material man thereafter filing his notice of lien.”

This case was reversed by the Court of Appeals, 193 N. Y. 37, but the reversal did not refute the statement here given. The building loan agreement in question provided that the mortgage to be given to secure the loan should be a first mortgage, but no provision was made for the payment of a prior mortgage on the premises. At the time of the first payment on the building loan, it was arranged by oral agreement that the prior mortgage should be paid. The builder subsequently abandoned the work and the plaintiffs filed a lien, claiming that by paying off the mortgage which existed on the premises when the loan was made the building loan agreement had been so modified as to entitle the lienor to a preference over the maker of the building loan. The Court of Appeals held that the lienor's claim was subsequent to that of the mortgagee under the building loan; that the maker of the loan was under no obligation to advance anything under it until

the premises were otherwise unencumbered. And since the existing mortgage was a matter of record, the lienor was chargeable with notice of it and had no right to assume that the full amount of the building loan would be applicable to building purposes. There was therefore no such modification of the building loan agreement as would entitle the lienor to a preference over the mortgagee under the building loan agreement. The court further decided that the building loan agreement need not necessarily provide for the disposition of the proceeds of the loan, and that the owner may apply the same as he sees fit.

It was held in the case of *Alyea v. Citizens' Savings Bank*, 12 A. D. 574, 42 N. Y. Supp. 185, before the enactment of this section, that there is no privity between a mortgagee under a building loan agreement and a lienor. But in the case of *Penn. Steel Co. v. Title Guarantee & Trust Co.*, it was claimed that a lienor may now resort to the unpaid portion of a building loan for the satisfaction of his lien. The case of *Anglo American S. & L. Co. v. Campbell*, 43 L. R. A. 622, was given as an authority in point. The court did not decide this question, but said:

“Assuming, without deciding the correctness of the proposition contended for, it may well be that an agreement for the diversion of the proceeds of a loan to other purposes than the improvement of the property would be of so vital a character, and so affect the security of contractors and material men, as to require it to be incorporated in an agreement for a building loan. But the oral agreement in this case was not of such a character.”

The fact that a lienor may know of the existence of a building loan agreement which has not been filed does not make his lien subject to it.

“ The statute absolutely and unconditionally prescribed the penalty which shall follow the failure to file such a paper. It does not prescribe, for instance, that the liability shall follow, in case of non-filing in favor of a material man who shall deliver materials in good faith and without notice of it.” *Packard v. Sugarman*, 66 N. Y. Supp. 30, 31 Misc. 623.

An order drawn by a mortgagor, under a building loan agreement, on a mortgagee, in favor of a person performing labor or furnishing materials for the improvement, does not come within the provisions of § 15 of the statute which subordinates unrecorded assignments to liens. Such an order is not drawn by or upon a contractor or sub-contractor or by any person holding such relation to the property, and therefore the mortgagee cannot escape liability on such an order by the fact that a lien was filed upon the property. *Rosenblum v. Tilden Imp. Co.*, 136 A. D. 743, 121 N. Y. Supp. 510.

§ 187. Duration and discharge of lien.

STATUTE.

“ § 17. Duration of lien.

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the

action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person."

" § 19. Discharge of lien generally.

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows: —

1. By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied and may be discharged.

2. By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien.

3. By order of the court vacating or canceling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

4. Either before or after the beginning of an action by the owner or contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. If the lienor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of said undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within

the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary."

" § 20. Discharge of lien by payment of money into court.

A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged, at any time before an action is commenced to foreclose such lien, by depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such action is commenced the lien may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after at least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action. Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words 'discharged by payment.' A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of the code of civil procedure relative to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys may be made by any court of record having jurisdiction of the parties and of the subject matter of the proceeding for the foreclosure of the lien for the discharge of which such moneys were deposited. If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record."

" § 55. Offer to pay money into court, or to deposit securities, in discharge of the lien.

At any time after an action is brought under the provision of this article, the owner may make and file with the clerk with whom the notice of lien is filed, if in a court of record, and if in a court not of record, with the court, an offer to pay into court the sum of money stated therein, or to execute and deposit securities which he may describe, in discharge of the lien, and serve upon the plaintiff a copy of such offer. If a written acceptance of the offer is filed with such clerk,

or court, within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order, that on depositing with such clerk, or court, the sum so offered, or the securities described, the lien shall be discharged, and that the money or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. If the offer is of money only, the court, on application and notice to the plaintiff, may make such order, without the acceptance of the offer by the plaintiff. If such action is brought in a court not of record, such order may be made by the county court of the county where such action is brought upon notice, and upon filing such order and depositing such sum of money or securities with the county clerk of such county, he shall forthwith discharge said notice of lien, by writing upon the margin of the record thereof, the words 'discharged by payment.' Money or securities deposited upon the acceptance of an offer pursuant to this section shall be held by the clerk or the court until the final determination of the action, including an appeal."

" § 57. Judgment may direct delivery of property in lieu of money.

If the owner has agreed to deliver bills, notes, securities or other obligations or any other species of property, in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, and the property affected by the lien cannot be sold, by virtue of such judgment, except in default of the owner to so deliver or deposit within the time directed by the court."

" § 59. Vacating of a mechanic's lien, by order of court.

A mechanic's lien on real property may be vacated and canceled by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed should not be vacated and canceled of record. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order."

§ 188. Duration of lien. Commencement of action.

If an order is not obtained extending the lien it expires one year after the date of its filing, unless an

action is commenced for its foreclosure and a *lis pendens* filed as directed by the statute, § 17. *In re Gabler*, 107 N. Y. Supp. 542, 57 Misc. 148.

The statute does not state what shall constitute the commencement of an action, and therefore resort must be had to Code of Civil Procedure, §§ 398-399, which prescribe that the action shall be commenced by the service of a summons. *Hammond v. Shepard*, 3 N. Y. Supp. 349, 50 Hun 318.

But the action can only be deemed to be commenced when all necessary parties are served. The service of the summons and complaint upon part of the defendants does not have the effect of commencing the action, unless those not served are united in interest with those served.

“ When the statute prescribes that an action must be begun within a limited time, it is implied that it should be begun against the person who may take advantage of the limitation and not against other persons not in the same limitation.” . . . The short statute is prescribed to hasten an adjudication of the action the outcome of which affects the title to real property. Therefore, if ‘ it is impossible to complete service within the year, an order could have been obtained continuing the lien for one year, or the summons and complaint could have been delivered to the sheriff for service which would have constituted commencement of the action.’ *Martin v. DeCoppet*, 118 N. Y. Supp. 523, 64 Misc. 385.

See also *Kelsey v. Rourke*, 50 How. Prac. 315; *Smith v. Gault*, 5 Month. Law Bulletin 54; *Henry v. Mayor*, 9 Misc. 376, 30 N. Y. Supp. 252; *Moore v. McLaughlin*, 11 A. D. 477, 42 N. Y. Supp. 256; *Bourton v. Cowan*, 80 Hun 392, 30 N. Y. Supp. 317, affirmed 150 N. Y. 583.

The mere filing of a summons, complaint and *lis*

pendens does not constitute a commencement of the action, and if before service of any of the defendants payment is made to the county clerk to discharge the lien, a motion to compel the defendants to pay a further sum to cover costs will be denied. *Empire City Lumber Co. v. Agress Const. Co.*, 75 Misc. 519, 135 N. Y. Supp. 879. But the action which the statute requires to be commenced is "an action to foreclose the lien." It does not require that the action should be by the lienor as plaintiff.

In fact the statute expressly prescribes (§ 17) that "if a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor."

The mere naming of a lienor as a defendant in an action to foreclose by another lienor does not make the first lienor a party to an action so as to preserve his lien, unless he is served within a period of one year after the date of the filing of his notice of lien. But if he is served, the fact that other parties defendant are not served does not invalidate his lien. It might be possible, therefore, that the plaintiff in such an action would lose his lien because of his failure to serve the necessary parties, and yet that by the commencement of the action the liens of others would be preserved.

"All that is required to preserve a lien is that the lienor be made a party to an action to foreclose the lien and that the summons be served upon him before it expires. It does not require him at his peril to see that all other defendants are served within that time."

And but one *lis pendens* need be filed. *Martin v. DeCoppet*, 118 N. Y. Supp. 523, 64 Misc. 385.

See also *C. T. Willard Co. v. City of New York*, 142 N. Y. Supp. 11, 81 Misc. 48.

These rules would probably hold true regardless of the provisions in § 18, by reason of the provisions of §§ 44 and 45 of the statute. See "Liens on Public Improvements," § 209.

Berger Mfg. Co. v. City of New York, 206 N. Y. 24; *Coleman & Kraus v. Board of Education*, 136 N. Y. Supp. 1054, 77 Misc. 504.

The term "another lien" as used in § 17 means another mechanic's lien. Section 2 of the statute defines a lienor as one having a lien by virtue of the provisions of the statute including his successor in interest. Therefore where an action is brought to foreclose a mortgage, the fact that a lienor under a mechanic's lien is made a defendant in such action does not operate to keep such lien alive. *Philbrick & Brother v. Florio Co-Operative Association*, 122 N. Y. Supp. 341, 137 A. D. 613, affirmed 200 N. Y. 526.

Any necessary party to an action for foreclosure can set up a defense that the liens of other parties have expired. So a trustee in bankruptcy can do so. *Martin v. DeCoppet*, 118 N. Y. Supp. 523, 64 Misc. 385.

A failure to so plead waives the defense. *Troy Public Works v. City of Yonkers*, 124 N. Y. Supp. 307, 68 Misc. 372.

Where an action to enforce a mechanic's lien is commenced within the statutory period, and judgment entered thereon dismissing the complaint, but not on the merits, a second action may then be brought even though it be commenced more than one year after the time of filing of the notice. The first action having been brought within the statutory period, the cause of

action is saved by the provisions of § 405, Code of Civil Procedure, which provides that if an action be commenced within the time limited therefor, and be terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action or a final judgment upon the merits, the plaintiff may commence a new action for the same cause after the expiration of the time so limited and within one year after such reversal or termination. *Conolly v. Hyams*, 176 N. Y. 403.

§ 189. *Lis pendens*.

The statute requires (§ 17) not only that an action shall be commenced, but that a notice of pendency thereof shall be filed in order to preserve the lien. *In re Gabler*, 107 N. Y. Supp. 542, 57 Misc. 148; *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173.

But if the lienor is made a party defendant by another lienor, the statute does not require that both should file notice of pendency of action.

“There is now no requirement of the statute for the filing of a *lis pendens* except as a concomitant of the bringing of an action, and when the Court of Appeals holds that when the lienors are parties defendant in an action to foreclose a similar lien, when the plaintiff has filed a *lis pendens*, the action is commenced, it necessarily follows that it is not necessary for the defendants to file a *lis pendens*.” *Coleman & Krauss v. Board of Education*, 136 N. Y. Supp. 1054, 77 Misc. 504.

After the filing of a *lis pendens*, a lienor who subsequently files a lien is barred by the judgment in foreclosure, to the extent that he is prevented from foreclosing his lien against the property. Under § 1671 Code of Civil Procedure he is bound by all proceedings taken in the action to the same extent as if he were a

party to it. This means that he is bound by the litigation only to the extent of the proceedings taken. He cannot enforce his lien therefore against property already sold in foreclosure by a previous lienor. But he is not bound as to any issue not raised or passed upon or involved in any proceeding taken in the foreclosure action. In such a case an issue between the lienor and the maker of a building loan, as to whether or not he had the right to have his lien paid out of payments made under the building loan agreement in contravention of its terms, is not litigated, and the lienor is not therefore bound by the judgment as to that issue. *Penn. Steel Co. v. Title Guarantee & Trust Co.*, 100 N. Y. Supp. 299, 50 Misc. 51.

Where a lien is discharged by the giving of an undertaking or the deposit of money or securities, the real property is discharged, and a *lis pendens* becomes unnecessary. *Ward v. Kilpatrick*, 85 N. Y. 414; *Sheffield v. Early*, 25 N. Y. Supp. 1098, 73 Hun 173; *Bates v. Trustees of Masonic Hall*, 27 N. Y. Supp. 951, 7 Misc. 609.

In such a case while the action is continued in form as one for the foreclosure of a lien, in effect the action for that purpose has abated. Therefore while the court has no power to cancel a *lis pendens* other than as prescribed in § 1674, Code of Civil Procedure, it may, where the lien has been discharged by undertaking, cancel the *lis pendens* on motion. *Breen v. Lennon*, 10 A. D. 36, 41 N. Y. Supp. 705; *Madden v. Lennon*, 50 N. Y. Supp. 690, 23 Misc. 79.

§ 190. Orders continuing liens.

The statute provides (§ 17) that the lien may be continued for a period of one year, by the lienor securing an order in a court of record within one year from the date of the filing of the lien, directing the redocket-

ing of the lien. The order for the continuation of the lien creates no new liability, and hence it may be obtained *ex parte* on grounds which satisfy the court. *Darrow v. Morgan*, 65 N. Y. 333. But the order has no effect until it is docketed. *Manton v. Brooklyn & Flatbush Realty Co.*, 145 N. Y. Supp. 996, 160 A. D. 783.

The fact that the lien has been discharged by an undertaking does not dispense with the necessity of securing an order for its extension if no action for foreclosure is brought within the time specified in the statute. *Berger Mfg. Co. v. City of New York*, 124 N. Y. Supp. 804, 67 Misc. 636, affirmed 206 N. Y. 24; *Clonin v. Lippe*, 106 N. Y. Supp. 58, 121 A. D. 463; *Kelly v. Highland Const. Co.*, 118 N. Y. Supp. 123, 133 A. D. 579.

The case of *In re Hurwitz*, 58 Misc. 379, 110 N. Y. Supp. 1105, is overruled.

In the case of *Kelly v. Highland Const. Co.*, it is intimated that where the lien is discharged by a deposit of money, no order extending the lien can be obtained. The basis of this statement is probably the argument of the court in the case of *In re 35th Street and 5th Avenue Realty Co.*, 106 N. Y. Supp. 390, 121 A. D. 625, wherein it was held that the deposit is to be paid back as soon as the lien is discharged by virtue of any of the provisions of the statute, and therefore upon a failure of the lienor to institute an action within the prescribed period, the owner becomes entitled to an order finally discharging the lien and refunding the deposit. But the statute also gives the lienor the right to secure an order extending his lien, and if he does so, his lien cannot be discharged "pursuant to law," (§ 20) or discharged as prescribed in subdivisions one, two or three of § 21, (see subdivision 4, § 21) until the expiration of the time of extension, upon his failure to commence an action for foreclosure.

§ 191. Discharge of lien. In general.

An examination of the provisions of the statute quoted at § 187 of the text discloses that there are seven methods by which a mechanic's lien may be discharged, as follows:

(A.) By the lienor.

1. By failure to commence an action to foreclose the lien within one year, and failure to secure an order extending the lien. (§§ 17 and 19, subdivision 2 of statute, and §§ 188 to 190 of text.)

2. By the filing of a certificate stating that the lien is satisfied. (§ 19, subdivision 1 of statute.)

3. By failure to commence an action to foreclose the lien within thirty days after demand made by the owner or contractor. (§ 19, subdivision 3 of statute; § 59 statute; §§ 201 and 198 of text.)

(B.) By the owner or the contractor.

4. Upon order of a court of record either before or after the commencement of an action, upon the giving of an undertaking. (§ 19, subdivision 4 of the statute; §§ 192 to 199 of text.)

5. By depositing with the county clerk before the commencement of an action to foreclose the lien, a sum of money equal to the amount claimed in the notice, with interest to the time of deposit. No order by the court directing the discharge of the lien is necessary. (§ 20 of statute; § 200 of text.)

6. By payment into court after the commencement of the action of such sum of money, as the court determines upon five days' notice to all parties is sufficient to pay any judgment recovered; an order of the court is necessary. (§ 20 statute; § 200 of text.)

(C.) By the owner.

7. After the commencement of an action in a court of record the owner may file with the county clerk an offer and serve upon the plaintiff a copy of such offer to pay into court a stated sum of money or to deposit designated securities. Upon acceptance and fulfillment of the offer the court may make an order discharging the lien. If the offer is for the payment of money only the court may order the lien discharged, without the acceptance of the offer by the plaintiff. (§ 55 of statute; § 200 of text.) If the action is in a court not of record the offer is filed with the court in which the action is pending; but the order discharging the lien must be made by a court of record. (§ 55 of statute; § 200 of text.)

An order for the discharge of a lien upon real property can only be made by a court of record having jurisdiction of the amount involved, whether the discharge be founded upon the giving of an undertaking, the deposit of money or securities or the payment of money into court. See *Matter of Ruderman*, New York Law Journal, January 21, 1914.

Thus the City Court of the City of New York is without jurisdiction of an action to enforce a mechanic's lien amounting to over \$2,000.00 and cannot direct the cancellation of a lien amounting to \$7,300.00 upon the giving of an undertaking for \$8,000.00. The City Court has no jurisdiction to approve such an undertaking under §§ 316 and 317, Code of Civil Procedure. *Steiger v. London*, 52 Misc. 462, 102 N. Y. Supp. 497.

The giving of an undertaking or a deposit of money or securities to secure the discharge of a lien is not an admission of the validity of the lien. *Parsons v. Moses*, 40 A. D. 58, 57 N. Y. Supp. 727, but when given by the

owner it amounts to a waiver of the defense by the person named as owner, that his interest in the property is insufficient to satisfy the lien. *Kerrigan v. Fielding*, 47 A. D. 246, 62 N. Y. Supp. 115. Unless the lien is established the sureties are not liable. *McKeefrey v. Cugley*, 145 N. Y. Supp. 102.

Where a lien has been discharged by a deposit of money, a motion for leave to withdraw the money deposited and substitute an undertaking will be denied. There is no statutory provision authorizing such substitution. *In re 478 Cherry Street*, 58 N. Y. Supp. 665, 27 Misc. 682.

A notice of lien which has been improperly filed may be cancelled on motion. Thus, where a lien has been discharged by the giving of an undertaking and a second lien is filed on the same day for the identical labor and materials, it will be discharged on an application to cancel a paper improperly filed. The application is not to discharge a mechanic's lien under the statute, but for a cancellation of the paper. *In re Burnstein*, 68 N. Y. Supp. 742.

The power of the court to authorize the discharge of a lien is limited by the provisions of the statute. The right given to the owner to have a lien discharged is not intended to destroy the lien but merely to relieve the real estate, and to transfer the claim to the money deposited or to the undertaking. The validity of the lien cannot be tried out on the motion to fix the amount of the deposit, and an order directing the cancellation of the lien without requiring a substituted security is void. *Fisher v. Hussey*, 11 Misc. 529, 32 N. Y. Supp. 762.

The jurisdiction of a county court is not affected by the discharge of a lien by undertaking or deposit of money, even though the defendant is a non-resident of the county. The lienor is still obliged to show not

only a claim against the defendant but a right to a lien upon the property. *Raven v. Smith*, 27 N. Y. Supp. 611, 76 Hun 23.

§ 192. Discharge by undertaking. In general.

Under subdivision 4 of § 19 of the statute the undertaking to discharge the lien may be given by either the owner or the contractor.

The mere filing of the undertaking does not discharge the lien. An order of the court directing the discharge is necessary. *Copley v. Hay*, 16 Daly 446, 12 N. Y. Supp. 277; § 19 statute.

And the filing of a bond to discharge a lien does not reserve the bond as a separate security for that lien, until the lienor establishes his priority over other lienors. *Scherrer v. Hooper*, 18 N. Y. Supp. 459, 45 State 638.

Where one member of a firm of contractors has succeeded to the interests of all, on dissolution of the firm after the filing of a lien, he may sign the undertaking to discharge such lien as principal, with as much effect as if all had joined in the bond. And since the discharge of the lien does not relieve the other partners from personal liability on the claim they are as much responsible to the lienor as if they had joined in the undertaking. *New York Lumber Co. v. 73rd St. Bldg. Co.*, 3 N. Y. Supp. 937, 15 Daly 133. See also *Pingrey on Suretyship & Guaranty*, § 20.

Likewise where there is more than one owner, all need not join as principals on the undertaking. *Miller v. Schmitt*, 71 N. Y. Supp. 771, 35 Misc. 231.

In the Lien Law the terms undertaking and bond are used synonymously and where a bond has been executed to secure the discharge of the lien the sureties are estopped to deny its validity. See also General

Construction Law, § 14. *Mathiasen v. Shannon*, 25 Misc. 274, 54 N. Y. Supp. 305.

Nor can they object that the amount thereof exceeded the jurisdiction of the court. *Sheffield v. Robinson*, 30 N. Y. Supp. 799, 81 Hun 555.

The giving of a bond with fictitious and insufficient sureties has been held to be a **contempt of court**, punishable as such. *McAveney v. Brush*, 34 N. Y. Supp. 101, 13 Misc. 79, 1 A. D. 97, 37 N. Y. Supp. 105.

§ 193. Justification of sureties.

The provision of the statute, (§ 19) for the service of notice of the justification of sureties upon the lienor, must be strictly complied with. The statute calls for personal service on the lienor or his attorney. If the lienor does not appear by attorney and cannot be found, then the service may be made by leaving a copy of the notice at the place of residence of an individual lienor, or the place of business of a corporation lienor. If notice cannot be given in either of these ways, then the court may exercise its discretion.

In the case of *In re Blumberg*, 133 N. Y. Supp. 774, 149 A. D. 303, the lienor's assignee resided in Chicago. The owner obtained an order *ex parte*, fixing the amount of the bond and directing that notice of justification be served upon the assignee by mailing a copy thereof to her at Chicago. The lien was discharged; but on motion to vacate the order of discharge the court held that the order had been improperly granted, saying:

“ When the statute is silent as to the character of the service it must be personal. When it prescribes the method of service that method must be strictly pursued. The latter provision quoted is limited to cases where the lienor cannot be found or does not

appear by attorney (which seems to be this case if it is within the purview of the provision at all) and the service is to be made by leaving a copy of said undertaking and notice at the lienor's place of residence with a person of suitable age and discretion therein. And it is only under the further condition that if the house of the lienor's abode is not stated in said notice of lien, and is not known, any discretion as to manner of service is conferred on the court."

"It may well be that it is more convenient to reach the assignee by mail, but the argument of convenience has no place when the statute is plain and explicit. . . . We must take into consideration that this is a proceeding for the benefit of the owner of the premises, and that, therefore, he should be held to strict observance of the statutory requirements thereof."

It should be noted that on assignment of a lien it is necessary to state the assignee's address (§ 14, Statute).

§ 194. Procedure on foreclosure.

The earlier decisions on the question of the proper procedure to be followed in cases of foreclosure where the lien had been discharged by undertaking and as to the liability of sureties are conflicting, and the rules as to the proper practice were first definitely stated by the Court of Appeals in the case of *Morton v. Tucker*, 145 N. Y. 245. There the court said:

"The sureties in the bond intended and must be understood as undertaking to pay the amount which it should be adjudged was due and owing to the plaintiffs and which was chargeable against the property by virtue of their notice of lien. In other words the condition was for the payment of any judgment which might have been rendered against the property had

not the bond been given. The bond, as we have seen, is given to discharge the lien. It is one of the proceedings provided for by the statute, and it was evidently intended that the bond should take the place of the property and become the subject of the lien in the same form and manner as is provided for in the case of the payment of money into court or the deposit of securities under an order of the court after action brought."

"If this is so the practice is simple. The action is in equity brought under the statute in which all of the persons interested, including the sureties upon the bond, are made parties. The complaint is in the usual form, with the exception that it should allege the giving of the bond and the discharging of the lien so far as the real estate is concerned, and instead of asking judgment for a sale of the premises it should demand relief as against the persons executing the bond for the amount that should be determined to be payable upon the lien. The court then upon the trial can determine the rights and equities of all of the parties and award the final judgment contemplated by the statute."

The sureties on the undertaking may therefore be made parties in an action of foreclosure, or they may be sued separately on the undertaking after a judgment in foreclosure has been obtained. They are proper, but not necessary, parties to the foreclosure action, but the better practice is to make them parties. *Ringle v. Matthiesen*, 41 N. Y. Supp. 962, 10 A. D. 274, affirming 39 N. Y. Supp. 92, affirmed 158 N. Y. 740; *McDonald v. Mayor of New York*, 89 A. D. 131, 85 N. Y. Supp. 1096; *Mertz v. Press*, 99 A. D. 443, 91 N. Y. Supp. 264.

But if the sureties are brought in as defendants, a motion to amend the summons by striking their names

therefrom will usually be denied. *Brewster v. McLaughlin*, 58 N. Y. Supp. 989, 28 Misc. 50.

But in any event the sureties can never be held liable upon the undertaking until the lienor has established his right to a lien. They can set up any defense which would be available to the principal, and they will not be concluded by a default of the principal. *Aeschliman v. Presbyterian Hospital*, 165 N. Y. 296, affirming 53 N. Y. Supp. 998, 29 A. D. 630.

In *Harley v. Plant*, 134 N. Y. Supp. 122, 149 A. D. 719, the question of the liability of the sureties was fully discussed. The lien was for a public improvement, but the principles stated apply equally to the case of liens on real property. The lien was bonded and the city made a party, but the case was dismissed against the city because of the giving of the undertaking. The sureties were not parties to the action of foreclosure, so that the only effect of the action was to determine that the sub-contractor had a personal claim against the contractor. The court decided that the sureties could not be deprived of their day in court. The court distinguished the case from *Ringle v. Matthiesen*, saying:

“It is true that in *Ringle v. Matthiesen*, 10 A. D. 274, 41 N. Y. Supp. 962, affirmed 158 N. Y. 740, it was held that an action at law could be maintained where a bond had been given under the statute to discharge a mechanic's lien, and where after the lien was discharged, the action was prosecuted to judgment against the original parties, the sureties upon the bond not having been brought in as parties, but in that case the defendant was the owner of the property, and the judgment adjudged that the plaintiff recover against the defendants the amount of their claim and that they had a lien against the premises described therein for the amount of their claim. There was an adjudication

of a lien against the premises of the owner, who was a party to the action, and who had an interest to interpose any defense which might exist, and who would naturally keep his sureties advised of the situation, which is quite a different situation from that presented by the case at bar, where the action was to foreclose a lien against a fund in custody of the city of New York and where it was adjudged that the city was not a proper party to the action, and the complaint was dismissed as against the municipality and a mere personal judgment was entered against the contractor. The owner of the fund was not before the court. There is nothing in the record to show that the defendant contractor had earned any part of the fund or that he had any interest in asserting the rights of his sureties."

The doctrine of *Ringle v. Matthiesen* should not be extended, particularly in view of the attitude of the Court of Appeals in *Milliken Bros. v. City of New York*, 201 N. Y. 65.

See also *McKeefrey v. Cugley*, 145 N. Y. Supp. 102; *Romanik v. Rappoport*, 132 N. Y. Supp. 892, 148 A. D. 688; *Reilly v. Poerschke*, 19 Misc. 612, 44 N. Y. Supp. 422; *Miller v. McKeon*, 44 N. Y. Supp. 371, 15 A. D. 133; *Heagney v. Hopkins*, 52 N. Y. Supp. 207, 23 Misc. 608; *Gallick v. Engelhardt*, 73 N. Y. Supp. 309, 36 Misc. 269; *White v. Livingston*, 75 N. Y. Supp. 466, 69 A. D. 361.

§ 195. Permission to sue on undertaking. § 814, Code of Civil Proc.

The undertaking provided for in § 19 is made to the clerk of the county where the premises are situated. § 814 of the Code of Civil Procedure provides that where an undertaking has been given to a public officer for the benefit of a party or other person interested,

and provision is not made for the prosecution thereof, the party interested may maintain an action in his own name for a breach of the terms of the undertaking upon procuring an order granting him leave to do so.

It has been held that under this section of the Code it is necessary to secure permission from the court to sue the sureties on the undertaking. *Ringle v. Wallis Iron Works*, 38 N. Y. Supp. 875, 16 Misc. 167, 25 Civil Proc. 261, and *Goldstein v. Michelson*, 91 N. Y. Supp. 33, 45 Misc. 601.

But it has also been held more recently that it is not necessary to secure such permission. *Schultz v. Teichman Eng. Co.*, 140 N. Y. Supp. 429, 79 Misc. 357; *Reilly v. Poerschke*, 19 Misc. 612, 44 N. Y. Supp. 422; *Vitelli v. May*, 104 N. Y. Supp. 1082, 120 A. D. 448.

Since the procedure to enforce the lien is provided for by the Lien Law, and the action is one in equity, and the sureties may be made parties to the foreclosure action, it would seem that the latter cases are correct.

§ 196. Sureties' liability on appeal.

If an appeal is taken from a judgment in favor of a lienor and an undertaking given upon the appeal, the sureties upon the undertaking given to discharge the lien cannot insist that the lienor pursue his remedy against the sureties upon the undertaking upon the appeal, before endeavoring to hold them liable. *Sullivan v. Goodwin*, 51 N. Y. Supp. 1000, 30 A. D. 194.

Where a contractor and sub-contractor both file liens and the contractor secures the discharge of the sub-contractor's lien by an undertaking, upon judgment being rendered in favor of both lienors, if the owner appeals, a stay granted to the owner will not stay an action by the sub-contractor on the undertaking given by the sub-contractor. If the undertaking discharging

the lien had been given by the owner, a stay on appeal granted to him would act as a stay of action against the sureties on the undertaking discharging the lien. However, in the first case a stay would probably be granted on proper application. *Heagney v. Hopkins*, 52 N. Y. Supp. 207, 23 Misc. 608.

§ 197. Undertaking does not preserve lien.

Under the provisions of § 17 the lien expires at the expiration of one year from the date of the filing of the notice, unless an action of foreclosure is commenced as therein required, or an order is obtained extending the lien. The fact that the lien has been discharged by the giving of an undertaking does not preserve it beyond the period of one year, if no action is commenced or no order of extension is obtained. The older cases holding to the contrary are not applicable under the present statute. *Berger Mfg. Co. v. City of New York*, 124 N. Y. Supp. 804, 67 Misc. 636, affirmed 206 N. Y. 24; *Clonin v. Lippe*, 106 N. Y. Supp. 58, 121 A. D. 463.

But where an undertaking is given for the discharge of the lien, since there is no express provision in the statute as to the time within which an action must be commenced to enforce the undertaking, the time within which such action may be commenced can be extended by an order secured as provided for in § 17. *Kelly v. Highland Const. Co.*, 118 N. Y. Supp. 123, 133 A. D. 579.

The case of *In re Hurwitz*, 58 Misc. 379, 110 N. Y. Supp. 1105, is overruled.

§ 198. Section 59 not applicable.

Where a lien has been discharged by the giving of an undertaking, § 59 of the statute is not applicable,

and the owner cannot compel the lienor to commence his action to foreclosure within thirty days as therein provided for. By the giving of the undertaking the lienor's time to sue is extended one year from the date of filing the notice of lien. *Uris v. Brackett Realty Co.*, 99 N. Y. Supp. 642, 114 A. D. 29.

§ 199. Cancellation of undertaking.

Since the undertaking merely takes the place of the property against which the lien is claimed, and the action to enforce liability against the sureties must still be brought in the form of foreclosure, if the action is not commenced within the period prescribed by the statute, and if no order is obtained extending the lien, a motion for the cancellation of the undertaking will be granted. *In re Thornton Apartment Co.*, 133 N. Y. Supp. 756, 74 Misc. 210.

The decision holding to the contrary in the case of *In re Greines*, 112 N. Y. Supp. 640, 60 Misc. 542, is unsound.

§ 200. Discharge by deposit of money or securities. §§ 20 and 55, Statute.

In addition to the giving of an undertaking there are three methods of discharging a mechanic's lien on real property by the substitution of security for the real property as provided for by § 20 and § 55 of the statute. The advantages of the provisions of § 55 are limited to the owner, but § 20 contains no such limitation and it may therefore be assumed that both the owner and contractor may discharge a lien as therein provided, since it has been held that the provisions of § 59 may be employed by both the owner and contractor. See *In re Weeks*, 130 N. Y. Supp. 930, 73 Misc. 242.

The effect of the procedure provided for by § 20 and § 55 is merely to discharge the lien and release the real property from its incumbrance. It is not an admission of the validity of the lien by the owner or contractor; *Parsons v. Moses*, 40 A. D. 58, 57 N. Y. Supp. 727, and does not operate as a confession of judgment. The lienor has no claim upon the money or securities deposited to discharge the lien until he has established his right to a lien. *In re Dean*, 31 N. Y. Supp. 959, 83 Hun 413; *Schillinger Cement Co. v. Arnott*, 152 N. Y. 584.

Under § 20 before the commencement of an action, if the owner or contractor deposits with the county clerk the amount of money claimed in the notice of lien with interest to date, the lien is discharged without further order. After the action is commenced an order of the court must first be obtained upon notice to all parties to the action fixing the amount of the deposit. Since the amount of the deposit must be sufficient to pay any judgment, all liens are discharged.

A mere filing of the summons and complaint and *lis pendens* in the county clerk's office does not constitute the commencement of an action. And if on the same day as such filing the owner pays to the county clerk the amount of the lien with interest to the date of the deposit pursuant to § 20 of the statute and the lien is marked "discharged by payment," such payment is made before the commencement of the action and a motion made to compel the plaintiff to pay a further sum to cover costs and to change the entry on the docket in the county clerk's office will be denied. *Empire City Lumber Co. v. Agress Const. Co.*, 75 Misc. 519, 135 N. Y. Supp. 879.

As to what constitutes the commencement of an action see §§ 188, 190.

Where after a sub-contractor's complaint to enforce

a mechanic's lien has been dismissed and he appeals only as to the contractor, and after the time to appeal as to the owner has expired the latter pays the amount due to the contractor, the court after reversal of a judgment as to the contractor has no power to order the owner to pay into court an amount sufficient to satisfy the plaintiff's claim, when the right to the money and the existence of the lien are disputed. *Van Kannel Revolving Door Co. v. Sloane*, 107 N. Y. Supp. 504, 122 A. D. 610.

Under § 55 the owner may discharge the *plaintiff's* lien, after the commencement of the action, by filing with the clerk of the court and serving upon the plaintiff an offer to pay into court a sum stated or to execute and deposit certain securities; if the offer is accepted within ten days, the court may make an order discharging the lien upon the depositing of the securities offered. If the offer is to deposit money only the court may make the order regardless of the acceptance of the owner. If the action is pending in a court not of record the offer is filed with the court and the order of discharge must be made by a court of record as provided in the statute.

This section of the statute makes provision only for the discharge of the plaintiff's lien, since it does not permit of service of the offer upon defendant lienors. In this respect § 55 of the statute differs from § 20 under the provisions of which all liens may be discharged "by a payment into court of such sum of money, as in the judgment of the court or a judge or justice thereof, after at least five days' notice to *all parties* to the action, will be sufficient to pay *any judgment* which may be recovered in such action."

That this distinction between the two sections was intended seems to be borne out by the provisions in each relating to the repayment of the deposit. In

§ 20 it is provided that the deposit may be repaid upon the discharge of “*the liens*” against the property pursuant to law. Under § 55 the deposit is to be held until the final determination of the action.

In *Hall v. Demmerlein*, 14 N. Y. Supp. 796, it was held that where an offer is made to pay money into court to discharge a lien the statute must be strictly complied with, its language followed, and the statement made that the offer is made for the purpose of discharging the lien. The provision is one strictly for the benefit of the owner. By accepting the offer the lienor gains nothing; by refusing it he becomes liable to pay costs.

The court says:

“The provision should, therefore, be strictly construed and a strict compliance with the statute required in the written offer which he makes and through which he claims the benefit of its provisions.”

Where the lienor refuses to accept the offer and the amount of his recovery does not exceed the amount of the offer with interest from the date of the offer, the lienor is not entitled to costs. *Schulte v. Lester-shire Boot & Shoe Co.*, 88 Hun 226, 34 N. Y. Supp. 663; *Salerno v. Vogt*, 138 N. Y. Supp. 664, 78 Misc. 64.

Where a judgment on the plaintiff's default in an action to foreclose a lien is vacated, the action is reinstated, and the court may direct that moneys which were on deposit with the county clerk to discharge the lien, and which were withdrawn by the defendant, should be redeposited. *Cunningham v. Hatch*, 18 N. Y. Supp. 458.

The statute provides in § 20 that the money deposited shall be repaid to the depositor upon the discharge of the liens “pursuant to law.” This means that the money will be paid back upon a discharge of the lien or liens pursuant to any of the provisions of § 19.

Therefore, upon a failure of the lienor to institute an action of foreclosure within one year, or to secure an order of extension, the lien expires and the court will direct the repayment of the deposit. *In re Thirty-fifth Street & Fifth Avenue Realty Co.*, 106 N. Y. Supp. 390, 121 A. D. 625; *In re Gabler*, 107 N. Y. Supp. 542, 57 Misc. 148.

But in the case of *Kelly v. Highland Const. Co.*, 118 N. Y. Supp. 123, 133 A. D. 579, it is intimated that where the lien is discharged by a deposit of money, no order extending the lien can be obtained.

And, although it was decided in *Uris v. Brackett Realty Co.*, 99 N. Y. Supp. 642, 114 A. D. 29, that where a lien is discharged by undertaking that § 59 of the statute is inapplicable, it is suggested in the case of *Thirty-fifth Street & Fifth Avenue Realty Co.*, 106 N. Y. Supp. 390, 121 A. D. 625, that where the lien is discharged by a deposit of money, that a motion could probably be made under § 59 to compel the lienor to foreclose the lien.

§§ 743 to 754 of the Code of Civil Procedure relate to payments of money into court.

Upon the discharge of a lien by payment of money into court the foreclosure is in form only. (See § 194.)

See also § 57 of statute with reference to judgments.

§ 201. Section 59.

The provisions of § 59 of the statute do not give the owner an absolute right to have the lien discharged upon a failure of the lienor to commence foreclosure within thirty days after notice. The statute is permissive and in the discretion of the court, and if good reason is shown for not granting the motion it will be denied.

In the case of *Jackson v. Haven*, 84 N. Y. Supp. 356,

87 A. D. 236, the lienor had prepared his summons and complaint and had served one party, but not another, and the court denied the motion, citing *Matter of Poole*, 14 N. Y. Supp. 790.

See also *Uris v. Brackett Realty Co.*, 99 N. Y. Supp. 642, 114 A. D. 29; *Thirty-fifth Street & Fifth Avenue Realty Co.*, 106 N. Y. Supp. 390, 121 A. D. 625.

“By the terms of the law, as it now reads, the right to serve the notice (under § 59) is not expressly limited to the owner. I believe that the notice may now be served by any person whose interests are affected by the lien. The lien practically garnishes the amount due to the contractor.” . . . “The granting of the motion is discretionary with the court, but it will be granted where the lienor commences a personal action in another court against the contractor after filing the lien as he thereby shows a preference for his trial in the other court by jury to his trial in equity under the lien law.” *In re Weeks*, 130 N. Y. Supp. 930, 73 Misc. 242.

On the filing of a notice of lien, the lien extends to the owner's interest in the lands, and a notice will not be cancelled merely because the contractor against whom the lien was also filed, successfully defended another action brought by the lienor on the same claim, if the owner was not a party. To obtain the cancellation of a mechanic's lien the procedure prescribed by the statute must be followed. Therefore in such a case a notice should have been served under § 59 of the Lien Law. *Matter of Bronitsky*, 136 A. D. 672, 121 N. Y. Supp. 422.

§ 202. Waiver of lien.

The right to acquire a lien may be waived by agreement. In *Matthews v. Young*, 16 Misc. 525, 40 N. Y.

Supp. 27, the contractor agreed with the owner as follows:

"It is also agreed and expressly understood that the party of the first part shall file or place no liens on above described buildings for the work herein contracted for."

The court said:

"This is a plain and independent covenant, one which the plaintiff had the right to make, and all interested parties may demand of him its strict observance, and as a matter of law the plaintiff never had any lien as provided by the statute in his favor against Young or his grantee."

But a provision in a contract that the contractor will not "at any time suffer or permit any lien, attachment or other encumbrance, by any person or persons whomsoever, to be put on or remain on the building or premises," does not preclude such contractor himself from filing a lien where the owner fails to make the payments due under the contract. *Kertscher v. Green*, 205 N. Y. 522, 67 Misc. 293, 124 N. Y. Supp. 461.

See also *Taylor v. Dutcher*, 69 N. Y. Supp. 951, 60 A. D. 531; *Lipman v. Jackson Iron Works*, 128 N. Y. 58; *Gallick v. Engelhardt*, 73 N. Y. Supp. 309, 36 Misc. 269; *Genung v. Hawkes*, 143 N. Y. Supp. 1015, 159 A. D. 30.

The submission of matters in dispute to arbitration is a waiver of the right to file a mechanic's lien. *N. Y. Lumber & Wood Working Co. v. Schneider*, 1 N. Y. Supp. 441, 15 Daly 5, affirmed 119 N. Y. 475.

Upon signing a waiver, proving his claim in bankruptcy against the contractor, and voting on the claim and transacting other business at a meeting of the creditors, a lienor waives his lien. *Brown v. City Nat'l. Bank*, 131 N. Y. Supp. 92, 72 Misc. 201.

But an agreement that an owner shall give other

security for the lien, such as a mortgage, does not amount to a waiver unless such security is actually given. The lien can be enforced after a breach of the agreement to give such security even though the notice has been filed before the breach. *Firth v. Rehfeldt*, 30 A. D. 326, 51 N. Y. Supp. 980, 164 N. Y. 588.

Every person entitled to a lien has two remedies, one *in rem* and one *in personam*. So that the only effect upon the lienor of giving an extension of time of payment is to postpone the power of the claimant to enforce his lien, until the time when the debt becomes due. The lien is not invalidated unless the time of payment is extended beyond the time prescribed by the statute for the commencement of an action to enforce the lien.

The right to acquire a lien is not therefore waived by the taking of a promissory note, even if endorsed by a third party, unless the time of payment is extended beyond the time within which an action must be commenced to enforce the lien. The fact that the time of payment extends beyond the 90 day period within which the lien must be filed, is not a waiver of the right to file the lien. *Keogh Mfg. Co. v. Eisenberg*, 27 N. Y. Supp. 356, 7 Misc. 79, affirmed 149 N. Y. 592; *Linneman v. Bieber*, 85 Hun 477, 33 N. Y. Supp. 129; *Jones v. Moores*, 67 Hun 109, 22 N. Y. Supp. 53, 142 N. Y. 661; *Mott v. Lansing*, 57 N. Y. 112; *King v. Greenway*, 71 N. Y. 413; *Happy v. Mosher*, 48 N. Y. 313; *Friedmann v. Lowenstein*, 135 N. Y. Supp. 569; *Lansberg v. Hein Const. Co.*, 120 N. Y. Supp. 190, 135 A. D. 819; *Miller v. Smith*, 47 N. Y. Supp. 49, 20 A. D. 507; *Matter of Froment*, 125 A. D. 647, 109 N. Y. Supp. 1073.

And a personal judgment may be secured against the owner after the expiration of a period of credit, even though it be conceded that by the extension of

credit he waived his lien. *Woolf v. Schaefer*, 93 N. Y. Supp. 184, 103 A. D. 567.

Where a contractor is unable to procure material on his own credit, and the owner agrees with him and the proposed material man to pay for it to the amount of the contract, and gives the material man his notes, the owner is not indebted to the contractor, having become obligated to pay his debt, and the property cannot be subjected to a lien by the material man. *Craig v. Blake*, 58 N. Y. Supp. 330, 27 Misc. 546.

But where a contractor is unable to go on with the work because of inability to pay material men, and the owner gives him a note which he endorses to a material man who applies it on the contractor's general account, the note does not amount to payment so as to preclude the material man from obtaining a lien on the owner's property on his non-payment of the note. *Hall v. Long*, 34 Misc. 1, 68 N. Y. Supp. 523.

CHAPTER THIRTEEN.

LIENS ON PUBLIC IMPROVEMENTS AND RAILROADS.

§ 203. Statute.

“§ 5. Liens under contracts for public improvements.

A person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of the state or of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article.”

“§ 12. Notice of lien on account of public improvements.

At any time before the construction of a public improvement is completed and accepted by the state or by the municipal corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his sub-contractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction and with the comptroller of the state or with the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made. The notice shall state the name and residence of the lienor, the name of the contractor or sub-contractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished and give a general description of the contract pursuant to which such public improvement was constructed. If the lienor is a partnership or a corporation, the notice shall state the business address of such partnership or corporation, the names of the partners, and if a foreign corporation, its principal place of business within the state. If the name of the contractor or sub-contractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the contractor or sub-contractor shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained

are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The comptroller of the state or the financial officer of the municipal corporation or other officer or person with whom the notice is filed shall enter the same in a book provided for that purpose, to be called the 'lien book.' Such entry shall include the name and residence of the lienor, the name of the contractor or subcontractor, the amount of the lien and date of filing, and a brief designation of the contract under which the lien arose."

" § 18. Duration of lien under contract for a public improvement.

If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the municipal corporation with whom the notice of such lien was filed, or unless an order be made by a court of record, continuing such lien, and a new docket be made stating such fact. And the supreme court of this state, or any justice thereof, or the county court of the county in which such lien was filed, or the county judge of such county, are hereby authorized to make an order continuing any such lien for a period not exceeding six months, upon the application of a lienor upon such affidavits or evidence as in the opinion of such court or judge shall be deemed sufficient. Nothing in this section contained, however, shall prevent any such court or judge from making a new order continuing such lien in each succeeding six months, if in the discretion of such court or judge the same shall be deemed just and equitable. This section is hereby declared to be a remedial statute and is to be construed liberally to secure the beneficial interests and purposes thereof."

" § 21. Discharge of lien for public improvement.

A lien against the amount due or to become due a contractor from the state or a municipal corporation for the construction of a public improvement may be discharged as follows:

1. By filing a certificate of the lienor or his successor in interest, duly acknowledged and proved, stating that the lien is discharged.
2. By lapse of time, when three months have elapsed since filing the notice of lien, and no action has been commenced to enforce the lien.
3. By satisfaction of a judgment rendered in an action to enforce the lien.
4. By the contractor depositing with the comptroller of the state or the financial officer of the municipal corporation, or the officer or person with whom the notice of lien is filed, such a sum of money as is

directed by a justice of the supreme court, which shall not be less than the amount claimed by the lienor, with interest thereon for the term of one year from the time of making such deposit, and such additional amount as the justice deems sufficient to cover all costs and expenses. The amount so deposited shall remain with the comptroller or such financial officer or other officer or person until the lien is discharged as prescribed in sub-division one, two or three of this section.

5. Either before or after the beginning of an action by a contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the state or the municipal corporation with which the notice of lien is filed, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking with notice that the sureties will justify before the court or a judge or justice thereof at the time and place therein mentioned must be served upon the lienor, not less than five days before such time. If the lienor cannot be found, such service may be made as prescribed in sub-division four of section 19 of this article. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien. The execution of such undertaking by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of such an undertaking by two sureties, and where a certificate of solvency has been issued by the superintendent of insurance under the provisions of section one hundred and eighty-one of the insurance law and has not been revoked, no justification or notice thereof shall be necessary. Any such undertaking may be executed in such undertaking as surety by the hand of its officers or attorney duly authorized thereto by resolution of its board of directors, a certified copy of which resolution under the seal of such company, shall be filed with each undertaking. Except as otherwise provided herein the provisions of article five of title six of chapter eighth of the code of civil procedure are applicable to an undertaking given for the discharge of a lien on account of public improvements."

(As amended by Laws of 1914.)

"§ 25. Priority of liens for public improvements.

Persons having liens under contracts for public improvements standing in equal degrees as co-laborers or material men shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other liens arising under the same contracts pursuant to this article, without reference to the time when such laborers shall have filed their notice of lien."

§ 204. Distinction from liens on real property.

Except where the language of the section evidences a different intent, the various provisions of the statute should be held to relate to all mechanic's liens, both those on real property and those on public improvements. This is evidenced by the fact that both classes of liens are provided for in one article of the statute. *Brace v. City of Gloversville*, 167 N. Y. 452.

Thus §§ 23, 24 and 40, and the provisions of the statute relating to enforcement of liens apply to both kinds of lien.

The principal reason for providing for a distinct form of lien upon public improvement contracts is to prevent the inconvenience which would result from the sale of public real property for the enforcement of the claims of lienors. Therefore a lien on a public improvement contract does not attach to the real property, but is confined to the fund in possession of the public officer, applicable to the payment of the public improvement on account of which the services were rendered or the materials were furnished. *Clapper v. Strong*, 90 A. D. 546, 85 N. Y. Supp. 748; *Bader v. City of New York*, 101 N. Y. Supp. 351, 51 Misc. 358; *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173, 81 A. D. 460.

On the same theory and because of the small risk of insolvency of a municipality or state, there is no reason for allowing the contractor a lien. He needs no special protection. The funds to pay him are always available, and in order to recover he need only prove the performance of his contract. Accordingly by § 5 of the statute the right of lien is confined to subordinates of the contractor. And the supreme court has no jurisdiction, in an action to foreclose such a lien, to render a judgment against the state or munic-

ipality, in favor of the contractor, for any balance due him over the amount of the lienor's claims. He can only recover judgment in an independent action. *Smith v. State*, 118 N. Y. Supp. 780, 65 Misc. 376.

The lien is given where the contract is with the state or a municipal corporation. By § 3 of the General Corporation Law, the term municipal corporation includes a county, town, school district, village, city and any other territorial division of the state established by law, with the powers of local government. See also General Municipal Law, § 2. A lien on a public improvement cannot be enforced as a lien on real property, but the provisions of the statute relating to liens on public improvements must be complied with as to form and contents of notice and filing and service of the same. *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173, 81 A. D. 460.

Another important distinction between liens upon real property and liens upon public improvement contracts must be noted. § 9 of the statute provides that a notice of mechanic's lien against real property shall state the name of the person to whom the lienor furnished or is to furnish materials; the materials furnished or to be furnished, and the amount unpaid to such lienor. A mechanic's lien against real property can therefore be filed in anticipation of the delivery of materials. § 12, however, which relates to liens on public improvements provides that the notice shall state the name of the contractor for whom the materials were furnished; the amount claimed to be due or to become due; the date when due; a description of the public improvement upon which the labor was performed and materials expended, and the kind of labor performed and materials furnished. The language of this section plainly indicates a right to a lien only for work actually done or materials actually furnished,

and further proof of this is furnished in § 17, which in providing for the duration of a municipal lien, says: "If the lien is for labor done or materials furnished for a public improvement . . ." Both verbs are used in the past tense and plainly indicate that the materials must have been already furnished. *Goss v. Williams Engineering Co.*, 57 Misc. 58, 108 N. Y. Supp. 862.

§ 205. Extent of lien.

With the exceptions noted the lienor's rights as to the extent of his lien are the same as in the case of liens on real property. They extend to the amount due or to become due to the contractor from the state or municipal corporation. (See §§ 173 to 176, "Extent of Lien.") And the lienor must prove a balance due to the contractor to which his lien may attach. There is no distinction between § 4 and § 5 of the statute so far as this requirement is concerned. The lienors are entitled to such sums as are due to the contractor under whom they claim, at the time of filing the notice and such further sums as he may thereafter become entitled to. Those claiming under a sub-contractor have the burden of proving the amount due him when they filed their notices of lien and the amount thereafter accruing. As in the case of liens on real property, if nothing is due the sub-contractor the lienors cannot recover. *Upton v. United Engineering & Cont. Co.*, 130 N. Y. Supp. 726, 72 Misc. 541; *N. Dain's Sons Co. v. Union Free School*, 144 N. Y. Supp. 846, 83 Misc. 335. (See § 175.)

And liens against one contract for a public improvement cannot be paid out of moneys growing out of another contract. So if a bank contracts to finance certain contracts for public improvements taking as security assignments of the proceeds, which are

mingled in a common fund, liens filed against the contracts will attach to the balance of such fund in the hands of the bank, but only to the extent, in the case of each lien, to which part of said balance sprang from the contract against which the lien was filed. *C. T. Willard Co. v. City of New York*, 142 N. Y. Supp. 9 and 11, 81 Misc. 48.

§ 206. Notice of lien. Contents of notice.

The notice of lien on a contract for a public improvement must be such as is required in § 12, and the court cannot dispense with the provisions of the statute. *Bradley v. Huber*, 131 N. Y. Supp. 388, 146 A. D. 630.

But where the notice shows that it is a claim against the state as the owner of real estate described, it will not be held to be invalid because of a subsequent statement in a printed form of notice that a lien is claimed against real estate. Such statement will be regarded as surplusage. *Newman Lumber Co. v. Wemple*, 56 Misc. 168, 107 N. Y. Supp. 318.

But while the requirements of the notice provided for by § 12 differ somewhat from those provided for by § 9, the principles pointed out in the discussion of the latter section are generally applicable here. See "Contents of Notice of Lien," §§ 159 to 167 of text.

Thus the provisions of § 12 as to the name and residence of the lienor and as to the verification of the notice are the same as § 9. But since the lien on a public improvement contract is only against the proceeds of the contract, the name of the owner is not required but the contract under which the improvement is made must be described.

The name of the contractor or sub-contractor for whom the labor was performed or materials furnished must be given. But a failure to correctly state the

name of the contractor or sub-contractor does not affect the validity of the lien. *Troy Public Works Co. v. City of Yonkers*, 124 N. Y. Supp. 307, 68 Misc. 372, 145 A. D. 527, 129 N. Y. Supp. 520, 207 N. Y. 81.

But it should be noted that the lien may be acquired for past services only. *Goss v. Williams Eng. Co.*, 57 Misc. 58, 108 N. Y. Supp. 862. But the entire amount claimed need not be due at the time the notice is filed. The notice must also state the date when the amount claimed becomes due, but the statute does not require the dates when the first and last items of labor and material were rendered or furnished, because no such priority is given to lienors under public improvement contracts as is provided for in § 13 of the statute, (see § 165 of text) since public property cannot be assigned for the purpose of defeating the claims of lienors. The statute specifically requires that the notice shall state the kind of labor performed or materials furnished.

Letters written to the comptroller of the City of New York, by one furnishing material for a municipal improvement stating that the material was furnished to a sub-contractor, under an agreement of conditional sale by which the title was not to pass until the full purchase price was paid, are not equivalent to a notice of mechanic's lien if the letters are unverified, do not state the residence of the claimant, or whether it is a partnership or corporation, or the date when the purchase price is to become due or in other respects comply with the Lien Law.

And therefore the court has no authority to enter an order discharging such notices as mechanic's liens upon the giving of an undertaking by the contractor, nor will the court on a motion to discharge such notices as mechanic's liens determine the rights acquired by the material men on giving such notice. *Matter of Sheehan Co.*, 135 A. D. 94, 120 N. Y. Supp. 153.

§ 207. Filing notice.

The notice must be filed with head of department or bureau having charge of the construction and with the financial officer of the state or municipal corporation. Since two notices must be filed in different offices, it follows that they may be filed at different times. The statute does not state when the lien shall become effective; but the lien will date from the time of the filing with the financial officer, since it is in his office that it is docketed.

Where the public improvement is authorized to be carried on by the commissioners of sinking fund of the City of New York, a notice served upon the comptroller as financial officer is sufficient, since he is also a member of the sinking fund commission, there being no evidence that the commission is organized so that the notice should be served upon any particular member as head of that department. *Hawkins v. Mapes-Reeve Const. Co.*, 178 N. Y. 236.

As to service of notice on a board, see General Construction Law, § 33.

In the case of a village where the work is carried on by a committee on roads, service upon the chairman of such committee as the head of department carrying on the work will be sufficient. *Rockland Lake Trap Rock Co. v. Village of Port Chester*, 102 A. D. 630, 92 N. Y. Supp. 631.

See also *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173, 81 A. D. 460; *Bader v. City of New York*, 101 N. Y. Supp. 351, 51 Misc. 358.

The statute does not in terms require the filing of two original notices. From the decision in *Kelly v. Syracuse*, 31 N. Y. Supp. 283, 10 Misc. 306, it would appear that a copy may be served on one of the officers required to be served.

The notice need not be personally served upon the officials designated.

In the case of City of New York it has been held that the comptroller may designate deputies to receive such notices. *McDonald v. City of New York*, 59 N. Y. Supp. 16, 42 A. D. 263.

But whether the comptroller would have the power to designate deputies in each of the various boroughs of the city to accept notices of lien is doubtful, since the time of filing the notice may be of extreme importance and only one lien book is provided for docketing.

§ 208. Time of filing.

The lien must be filed within thirty days after the completion and acceptance of the improvement. *Milliken v. City of New York*, 201 N. Y. 65, and §§ 168 and 169.

§ 209. Duration of lien.

The provisions of § 18 differ from those of § 17 not only in prescribing a shorter period of life for the lien, if no action is commenced for its foreclosure or order obtained extending the lien, but also in limiting the period of extension by order to six months; and furthermore in omitting the provision contained in § 17 with reference to a continuation of the lien by the institution of an action by another lienor.

It has been decided however, by the Court of Appeals in the case of *Berger Mfg. Co. v. City of New York*, 206 N. Y. 24, that if a lienor is made a party defendant in an action of foreclosure by another lienor, and is served with the summons within the period of three months from the date of filing the notice, provided the plaintiff has filed a proper notice of pendency

of the action, the defendant's lien is preserved by the commencement of such action.

The reason for the rule is that when an action is commenced by one lienor, he must make all lienors parties defendant, (statute, § 44). The court may then adjust and determine the equities of all the parties to the action, and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action. Therefore the commencement of an action by one lienor in which another lienor is made a defendant, is the commencement of an action to foreclose the second lien within the meaning of the statute, provided the defendant lienor be served with the summons within a period of three months from the date of the filing of his notice of lien. This is a compliance with § 18, because it is not there required that the action shall be commenced by the lienor, but merely that an action shall be "commenced to foreclose such lien" and "a notice of pendency of such action" be filed. The filing of the plaintiff's notice of pendency of action is sufficient. *Coleman & Kraus v. Board of Education*, 136 N. Y. Supp. 1054, 77 Misc. 504.

The result arrived at in the case of *Newman Lumber Co. v. Wemple*, 107 N. Y. Supp. 318, 56 Misc. 168, on this question is correct, but the reasoning by which it is reached appears to be unsound. The court bases its decision in part upon the provisions of § 17, (then § 16) to the effect that if a lienor is made a defendant in an action to foreclose another lien, he need not commence an action to foreclose his own lien. But the provisions of § 17 have no application to liens on public improvements. See § 204.

For the reasons given the decision in the case of *Bradley v. Huber*, 131 N. Y. Supp. 388, 146 A. D. 630, appears to be unsound.

For other authorities upon this topic see §§ 188 and 189.

§ 210. Order continuing lien.

§ 18 provides that the order continuing the lien shall be made upon the application of the lienor showing good cause, and that the order may be made by the supreme court or by any justice thereof or by the county judge of the county in which the notice is filed. Under § 17 the order of continuation of liens upon real property may be made by a court of record, which includes the City Court of the City of New York. But it has been held that the City Court has no jurisdiction in actions in which the City of New York is a defendant, even in actions for the foreclosure of a lien where the city is a mere stakeholder. *Buess v. City of New York*, 141 N. Y. Supp. 426, 80 Misc. 391. And since in New York City all notices of lien must be filed in the office of the comptroller where the lien is docketed, which office is in the Borough of Manhattan, and New York County, it is doubtful whether the county courts of the various other boroughs of the city have jurisdiction to make such orders of extension of lien under § 18.

On the question of whether the comptroller of the City of New York has the power to designate deputies to accept notices of lien in the various counties of the city, see § 207.

For other citations see § 190.

§ 211. Discharge of lien.

The discharge of a lien on a contract for a public improvement may be accomplished in any one of five methods, as follows:

(A.) By the lienor.

(1). By filing a certificate that the lien is discharged (§ 21, subdivision 1 of statute.)

(2). By failure to either bring an action within three months or to secure an order extending the lien. (§ 21, subdivision 2 of statute.)

(3). By satisfaction of a judgment rendered in an action to enforce the lien. (§ 21, subdivision 3 of statute.)

(B.) By the contractor.

(4). By the contractor depositing with the financial officer with whom the lien is filed, an amount of money to be fixed by a justice of the supreme court, which shall not be less than the amount claimed with interest for one year. This method may be pursued either before or after the action is commenced, and no notice of the presentation of the order is required. (§ 21, subdivision 4, of statute.)

(5). By order, upon the contractor, either before or after the commencement of the action giving an undertaking the amount of which shall be fixed by a court, judge or justice thereof. The statute does not state who may make the order fixing the amount of the undertaking and discharging the lien, but provides that the provisions of the Code of Civil Procedure, §§ 810 to 816, shall apply. § 812 of the code provides:

“The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken.”

If therefore the undertaking is given after the action has been commenced, the undertaking must be approved by a judge or justice of that court. If the action has not been commenced the undertaking may

be approved by a judge or justice of a court of record, having jurisdiction of an action to foreclose the lien. The order for the discharge of the lien cannot be made by a court not of record, and if the action is pending in such a court, the undertaking must be approved by a justice of the supreme court or a judge of the county court of the county in which the notice of lien is filed.

§ 59 of the statute (see § 201 of text) does not apply to liens on public improvement contracts, and there is no similar provision affecting such liens, by which the contractor may require the institution of an action upon notice to the lienor.

After the discharge of a lien for a public improvement by undertaking or deposit of money, the subcontractor or those claiming through him must still prove a balance due to the contractor to which the lien can attach. The sureties upon the undertaking do not become liable for the amount of any personal judgment which may be obtained against the contractor. The sureties' liability is "for the payment of any judgment which may be recovered in an action to enforce the lien," (§ 21) and the lien extends only to the "amount due or to become due" on the contract. There is no distinction from the principles applicable in the case of liens upon real property. *Fitz Patrick v. Devlin*, 142 N. Y. Supp. 689, 81 Misc. 556; *Milliken Bros. v. City of New York*, 201 N. Y. 65; *Upson v. United Engineering & Cont. Co.*, 130 N. Y. Supp. 726, 72 Misc. 541; *Harley v. Plant*, 134 N. Y. Supp. 122, 149 A. D. 719; *Casey v. Connors Bros. Coal Co.*, 103 N. Y. Supp. 1103, 53 Misc. 101; *Buess v. City of New York*, 141 N. Y. Supp. 426, 80 Misc. 391.

For other authorities see the following sections, relating to Liens on Real Property: Discharge in General, § 191; Discharge on Undertaking, § 192;

Justification of Sureties, § 193; Procedure on Foreclosure, § 194; Action on Undertaking; Liability of Sureties; Cancellation of Undertaking, §§ 195 to 199; Discharge upon Payment into Court, § 200.

§ 212. Priority of liens.

Under § 25 laborers for daily or weekly wages on public improvements have preference over all other lienors without reference to the time of filing notice of their liens. But such preference exists only as to the time of filing among those who have filed liens within the purview of the law and does not relate back to the time when the services were rendered or the materials furnished. *Riverside Const. Co. v. City of New York*, N. Y. Law Journal, December 23, 1913; *McDonald v. Village of Ballston Spa*, 34 Misc. 496, 70 N. Y. Supp. 279.

See also "Priorities," §§ 179 to 185; "Assignments," §§ 244 to 251.

LIENS FOR LABOR ON RAILROADS.

§ 212a. Statute.

"§ 6. Liens for labor on railroads.

Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of mechanic's lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the code of civil procedure for the service of summons in actions in justices' courts against domestic railroad corporations."

See also § 61 of the statute relating to judgments in actions to enforce liens on the property of railroad corporations. § 239 of text.

The question of whether a lien can be acquired against a railroad company for materials furnished and used in the construction of its road, was raised in the case of *Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306, and answered affirmatively.

The court discusses the question, as follows:

“ By § 2 of the lien law the term ‘ real property ’ ‘ includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads. . . . ’ If we understand the argument for the respondent, it is that as to railroads the general language of § 3 of the lien law, giving the right to a lien in favor of one who furnishes materials or performs labor for the improvement of real property, is limited by the language of § 2 defining the term ‘ real property, ’ so as to restrict the right of lien to labor performed and material furnished upon bridges and trestle work and the structures connected therewith erected for the use of railroads. We are not impressed by this argument. We think the addition of the words ‘ and all bridges and trestle work and structures connected therewith erected for the use of railroads ’ to the general definition of the term ‘ real property ’ denotes a legislative intent to enlarge, rather than restrict, the statutory meaning of that term as applied to the subject of mechanics’ liens. When §§ 2 and 3 of the lien law are read together, as component parts of one law, their fair construction is that any of the persons designated in the latter section may acquire a lien for the purposes therein named, and that the term ‘ real property ’ shall not only include real estate, lands, tenements,

hereditaments, corporeal and incorporeal, and fixtures, but in addition thereto all bridges and trestle work and structures connected therewith for the use of railroads. In making this specific reference to a certain class of railroad structures the legislature seems to have intended to remove them from the realm of uncertain classification and place them unmistakably in the general category of real property. This view of the statute seems to be strengthened rather than weakened by the provision of § 6 of the lien law, which gives to any person who shall perform any labor for a railroad corporation a lien for the value of such labor upon its railroad track, rolling stock, land and appurtenances, by complying with the provisions of the act. It would be quite unreasonable, we think, to impute to the legislature an intention to give a general laborer for a railroad corporation a lien upon all of its property, and to deprive one whose labor and material goes into the building of a railroad of the right to any lien unless he happens to have performed labor or furnished material for one or more of its bridges, trestles or structures connected therewith.

It was clearly the intention of the legislature in enacting the present General Lien Law to assimilate and harmonize as far as possible the entire law embraced in the subject into a complete and harmonious statute, the various provisions of which should be held to relate to all mechanics' liens affecting all real property whether public, semi-public or private, unless the language of the act evidences a different intent, or where from the nature of the subject the regulations as to one class are inapplicable to another. (*Brace v. City of Gloversville*, 167 N. Y. 452.) If this was the purpose of the statute, there is no force in the respondent's argument to the effect that because a railroad company is a quasi-public corporation, the

construction and operation of which are for the public use and benefit, the ordinary lien laws which give to mechanics and material men a lien upon buildings constructed by them, are not to be considered to extend to the roadway and other property of a railroad corporation essential to the operation and maintenance of its road, except when express provision is made therefor. As we have already stated, it is not apparent why the legislature should give to the general employees of a quasi-public corporation a lien upon all of its property, and at the same time deny to one whose labor or material has contributed to the construction of the road any lien except for such labor and materials as form part of a few specially enumerated structures.”

CHAPTER FOURTEEN.**ENFORCEMENT OF LIENS.****§ 213. Pleading and practice.****STATUTE.**

The provisions for the enforcement of liens upon real property and public improvements are found in Article 3 of the Lien Law, comprising §§ 40 to 61.

“ § 40. Construction of article.

This article is to be construed in connection with article two of this chapter, and provides proceedings for the enforcement of liens for labor performed and materials furnished in the improvement of real property, created by virtue of such article.”

“ § 41. Enforcement of a mechanic's lien on real property.

A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.”

“ § 42. Enforcement of a lien under contract for a public improvement.

A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the municipal corporation for which such public improvement is constructed, to the extent prescribed in article two of this chapter, and against the contractor or sub-contractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.”

“ § 43. Action in a court of record; consolidation of actions.

The provisions of the code of civil procedure, relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided in this article. If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.”

§ 214. Jurisdiction. Courts of record.

The action to foreclose the lien must be brought in a court having jurisdiction of an action founded on a contract for a sum of money equivalent to the amount of such debt. If the court has jurisdiction of the amount involved, in a court of record, the general spirit of equity controls, and even though the court has no general equity jurisdiction it can determine the validity of claims that in any way interfere with the enforcement of a lien under the Mechanic's Lien Law.

Thus it is held that since the City Court of the City of New York has jurisdiction of an action to foreclose a mechanic's lien, it has power as an incident to that jurisdiction to declare fraudulent a transfer intended to defeat such a lien. And the New York City Court has jurisdiction of an action wherein the complaint demands judgment for a greater sum than \$2,000.00 with interest and costs, even though a judgment in excess of that amount cannot be entered. *Lickerman v. Motchan*, 143 N. Y. Supp. 731, 82 Misc. 405; *Seeley v. Osborne*, 145 N. Y. Supp. 237, 83 Misc. 409.

In *Murray v. Gerety*, 11 N. Y. Supp. 205, the court said:

“ This court has the same power in mechanic's lien cases that the other courts of record exercise. We proceed alike under the same statute to attain the same end. The defendants plead the transfers in defense, and like a general release or other document pleaded in bar of a recovery, the court may in a proper case, and even in a common-law action, adjudge such instruments to be void so as to destroy their effect as a defense. The action is to foreclose a lien, and declaring fraudulent a transfer intended to defeat the lien is an incident to the jurisdiction necessary to make it effective.”

See also *Schultz v. Teichman Eng. & Cont. Co.*, 140 N. Y. Supp. 429, 79 Misc. 357; *Marcus v. Aufses*, 94 N. Y. Supp. 397; *Concord v. Plante*, 116 N. Y. Supp. 153, 63 Misc. 120.

The City Court of the City of New York has no jurisdiction where the City of New York is a defendant. *Buess v. City of New York*, 80 Misc. 391, 141 N. Y. Supp. 426; *Steiger v. London*, 52 Misc. 462, 102 N. Y. Supp. 497.

Where the jurisdiction of a court is limited to a specified territory or otherwise, the provisions of the Lien Law do not enlarge such jurisdiction. Thus, §§ 315-338 of the Code of Civil Procedure give the City Court of New York jurisdiction to foreclose mechanic's liens, but restrict the execution of its mandate to the City of New York. But the court has no jurisdiction over the person of a defendant in such an action served without the city, notwithstanding §§ 41 and 43 of the Lien Law, giving courts of record which have jurisdiction in an action on contract for a sum due, jurisdiction to enforce a lien for a like amount. *McCann v. Gerding*, 60 N. Y. Supp. 467, 29 Misc. 283, reversing 59 N. Y. Supp. 381, 27 Misc. 845.

But the case of *Raven v. Smith*, 148 N. Y. 415, should be noted. There it was held that a county court had jurisdiction to enforce a lien on property within the county, even though the defendant resided without the county. In such case, however, the process of the court might be served without the county. This would not be true in the case first cited.

It appears that under § 982 of the Code of Civil Procedure the action should be brought in the county in which the real property is situated. But if the lien has been discharged by the giving of an undertaking or deposit of money, the action ceases to be one affect-

ing real estate, and § 982 does not apply. *Nims v. Merritt*, 60 N. Y. Supp. 549, 29 Misc. 58.

Courts not of record.

For jurisdiction of courts not of record, see § 243.

Damages.

In an action to foreclose a mechanic's lien, the court has no jurisdiction to award damages for breach of contract, see § 157.

Commencement of action.

See § 188 on what constitutes commencement of action. Also § 220 on the amount which may be demanded and recovered.

§ 215. Who may sue.

The action to enforce a mechanic's lien may be brought by the lienor, his assignee or legal representative. (§§ 41 and 14, Lien Law. See "Assignments," § 244.)

Bankruptcy.

A trustee in bankruptcy may acquire a mechanic's lien for work done by the bankrupt and bring action thereon. *Held v. Burke*, 83 A. D. 509, 82 N. Y. Supp. 426; *Davis v. Fidelity & Deposit Co.*, 75 A. D. 518, 78 N. Y. Supp. 336.

The filing of a petition in bankruptcy by the contractor does not prevent the filing and enforcement of a mechanic's lien by a material man who furnished material to the contractor. *Crane v. Smythe*, 87 N. Y. Supp. 917, 94 A. D. 53, affirmed 182 N. Y. 545. The theory is the same as that which subordinates the claims of a general assignee to those of a lienor. *Kane v. Kinney*, 174 N. Y. 69.

And it has been held that the rule has not been changed by the amendment of the Bankruptcy Law, (§ 47, cl. 2, subd. a) in 1910. *Hildreth Granite Co. v. City of Watervliet*, 146 N. Y. Supp. 449, reversing 82 Misc. 243, 143 N. Y. Supp. 868; see Collier on Bankruptcy.

Non-residents.

While the statute has no extra-territorial force, non-residence within the state is no bar to the acquisition of a mechanic's lien, provided the material claimed for was delivered within the state, even though the contract was made without the state. *Campbell v. Coon*, 149 N. Y. 556; *Birmingham Iron Foundry Co. v. Glen Cove Starch Co.*, 78 N. Y. 30.

Corporations.

It is clear under the present statute that a corporation may file a mechanic's lien. And it was so held under the former statute where the right was given to a "person or persons." *Gaskell v. Beard*, 11 N. Y. Supp. 399, 58 Hun 101.

Foreign corporations.

A foreign corporation may file a mechanic's lien. *In re Simonds Furnace Co.*, 61 N. Y. Supp. 974, 30 Misc. 209; *N. Y. Archt. Terra Cotta Works v. Williams*, 92 N. Y. Supp. 808, 102 A. D. 1. That a foreign corporation may become a lienor is specifically recognized in § 9 and § 12 of the statute.

But if the basis of the lien is a contract made within the state by the foreign corporation, consideration must be given to §§ 15 and 16 of the General Corporation Law, and § 181 of the Tax Law, providing conditions upon which foreign corporations may do business within the state.

Consolidated corporations.

Where corporations are consolidated pursuant to §§ 7 and 10 of the General Business Corporation Law, the new corporation may file a lien for such materials as it furnished, subsequent to the consolidation and also for materials furnished prior thereto by one of the corporations so consolidated. *Chambers v. Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562.

Undisclosed principal.

An undisclosed principal may sue to enforce a mechanic's lien but any defenses available against the agent are available against the principal. *Berry v. Gavin*, 34 N. Y. Supp. 505, 88 Hun 1.

After assignment.

If prior to the filing of the lien the contractor has assigned his contract as collateral security for materials furnished, which assignment is only to become absolute upon the happening of certain contingencies which do not eventuate until after the commencement of the action, and an absolute assignment is then made of the cause of action set out in the complaint, the action may be continued in the name of the contractor under § 756 of the Code of Civil Procedure unless the court directs the substitution of the transferee. *Hawkins v. Mapes Reeve Const. Co.*, 178 N. Y. 236. See also *Rothbarth v. Herzfeld*, 144 N. Y. Supp. 974, 159 A. D. 732.

Consolidation of actions.

Any lienor may commence his separate action subject to the right of other lienors to move for a consolidation of the actions. *Burton v. Cowan*, 30 N. Y. Supp. 317, 80 Hun 392.

This is provided for in § 43 of the statute, which states that if actions are brought by different lienors in a court of record, the court in which the first action is brought may upon its own motion or upon application of any party in any such action consolidate all of such actions.

The following sections of the Code of Civil Procedure must also be noted:

“ § 817. Consolidating causes in same court.

Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action.”

“ § 818. *Id.*; in different courts.

Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court.”

While § 818 of the Code of Civil Procedure and § 43 of the Lien Law are to some extent inconsistent, it has been held in the case of *Boyd v. Stewart*, 24 N. Y. Supp. 830, 30 Abb. N. C. 127, that where one of the actions is pending in the supreme court, but the first action commenced is pending in the city court, that the city court has jurisdiction to consolidate the supreme court action with the city court action, and also to consolidate all other actions commenced subsequent to the city court action.

The case of *Eckenroth v. Egan*, 46 N. Y. Supp. 666, 20 Misc. 508, holds that § 43 of the Lien Law is no broader than § 818 of the Code of Civil Procedure, and, therefore, an action which has been partly tried cannot be consolidated with one in which the issues have just been joined.

But if one of the actions which it is sought to consolidate is pending in a court lacking jurisdiction of

the action, there is no action pending which can be transferred to another court and thus consolidated. Thus, if one of the actions is against the City of New York and is pending in the City Court of the City of New York, that court being without jurisdiction of such an action, there is no action pending which can be transferred to the supreme court for the purposes of consolidation with an action there pending. *Innesfield v. City of New York*, New York Law Journal, November 6, 1913.

Nor can actions be consolidated if the consolidated action would involve an amount in excess of the jurisdiction of the court in which the consolidated action would be pending. But the actions may be transferred to a court of competent jurisdiction and then consolidated. *O'Neill Inc. v. Lockwhit Co.*, 82 Misc. 383, 143 N. Y. Supp. 729.

See also *Hinkle v. Sullivan*, 108 A. D. 316, 95 N. Y. Supp. 788; *Melen v. Athens Hotel Co.*, 149 A. D. 534, 133 N. Y. Supp. 1079; *Hawkins v. Mapes Reeve Const. Co.*, 82 A. D. 73, 81 N. Y. Supp. 794.

§ 216. Parties.

STATUTE.

"§ 44. Parties to an action in a court of record.

In an action in a court of record the following are necessary parties defendant:

1. All lienors having liens against the same property or any part thereof.

2. All other persons having subsequent liens or claims against the property, by judgment, mortgage or otherwise, and

3. All persons appearing by the records in the office of the county clerk or register to be overseers of such property or any part thereof. Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant. Two or more lienors having liens upon the same property or any part thereof, may join as plaintiffs.

(The word "overseers" should read "owners.")

4. The state, in the same manner as a private person, when the lien is one filed against funds of the state for which public improvement is constructed. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people."

"§ 45. Equities of lienors to be determined.

The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action."

CODE OF CIVIL PROCEDURE.

"§ 452. When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

§ 217. Necessary parties.

The statute distinguishes between actions brought in courts of record and those brought in courts not of record. The object of § 44 is explained by § 45, and these sections apply only to actions in a court of record. The court must adjust and determine the equities of all the parties, and also the order of priority of the different liens, the procedure being the same as in an action to foreclose a mortgage. Therefore, all parties in interest, including not only all those having incumbrances by way of mechanic's liens, but those having subsequent claims by way of judgment, mortgage or otherwise, are required to be made parties defendant. *Faville v. Hadcock*, 39 Misc. 397, 80 N. Y. Supp. 23; *Hinkle v. Sullivan*, 108 A. D. 316, 95 N. Y. Supp. 788; *Mellen v. Athens Hotel Co.*, 133 N. Y. Supp. 1079, 149 A. D. 534.

A prior mortgagee is improperly made a party defendant, since the statute requires only subsequent mortgagees to be joined as defendants. *Brown v. Danforth*, 55 N. Y. Supp. 825, 37 A. D. 321.

In an action where the complaint alleges that A received a certain mortgage as trustee, which was duly recorded, and A is made a party defendant individually but not as trustee, there is a defect of parties defendant, since the statute requires that such a subsequent lienor must be made a defendant. *Schillinger Fire Proof Cement Co. v. Arnott*, 14 N. Y. Supp. 326, 86 Hun 618, affirmed 152 N. Y. 584.

In an action to foreclose against the assignee of a lease, it is not necessary to make the assignor a party defendant, although the lease and assignment are not of record. *Southard v. Moss*, 20 N. Y. Supp. 848, 2 Misc. 121, affirmed 141 N. Y. 607.

A failure to make all other lienors parties defendant, whether they are prior or subsequent lienors and for whatever reason, is fatal to the plaintiff's action. Therefore, even though one be omitted by mistake or irregularity in indexing, he must be brought in on motion of the plaintiff or by the court on its own motion. *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376.

And the fact that a plaintiff fails to make another lienholder a defendant, because of the failure to discover such lien by reason of a mistake made in naming the owner in such lien, is fatal, in spite of the provision in § 9 of the statute, to the effect that a failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. *Gass v. Souther*, 61 N. Y. Supp. 305, 46 A. D. 256.

Lienors whose liens are discharged by undertaking or deposit are not necessary parties to an action to

foreclose by another lienor. *In re Thirty-fifth Street and Fifth Avenue Realty Co.*, 106 N. Y. Supp. 390, 121 A. D. 625.

The owner is a necessary party, *Von Driesch v. Rohrig*, 61 N. Y. Supp. 341, 45 A. D. 526; *Maltby & Sons v. Boland Co.*, 152 A. D. 596, 137 N. Y. Supp. 470.

But the wife of an owner who has no other interest in the property than her inchoate right of dower is not a necessary party. *Johnston v. Dahlgren*, 14 Misc. 623, 36 N. Y. Supp. 806.

It is not necessary to join as defendants parties who furnish materials for a building, such as gas fixtures, under a contract of conditional sale, whereby the ownership remains in the sellers until after the payment in full. *Baldinger v. Levine*, 83 A. D. 130, 82 N. Y. Supp. 483.

§ 218. Proper parties.

The provisions of the statute, § 44, that those who have filed notices of lien, as well as those having subsequent liens and claims by judgment, mortgage or conveyance shall be made parties defendant, does not preclude making other parties defendants, when their presence is necessary for a complete determination of the action. Such parties are proper, though they may not be necessary by express provision of the statute. Thus, where an order, which acts as an equitable assignment, is drawn on the owner, and it is later refuted by the assignor who files a lien against the owner, if upon foreclosure the latter fails to make the assignee a party, he can be brought in under § 452, Code of Civil Procedure.

The parties named in § 44 are necessary parties, but the statute does not say that no other persons may

be or become necessary to a complete determination of the controversy. The determination of that question must be left to the court under § 452, Code of Civil Procedure. *Williams v. Edison Electric Illuminating Co.*, 16 N. Y. Supp. 857, 43 N. Y. State 126; *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376; *C. T. Willard Co. v. City of New York*, 142 N. Y. Supp. 9, 81 Misc. 48.

So one liable on the debt by reason of a guaranty agreement may be joined as a defendant. *Whisten v. Kellogg*, 100 N. Y. Supp. 526, 50 Misc. 409. But the court has no power to bring in a party where the action is to recover a sum of money only, and where the title to no real property is involved. *Bauer v. Dewey*, 166 N. Y. 402.

See also *Cook v. Lake*, 63 N. Y. Supp. 818, 50 A. D. 92; *Jewitt v. Schmidt*, 90 N. Y. Supp. 848, 45 Misc. 34; *Rothbarth v. Herzfeld*, 144 N. Y. Supp. 974, 159 A. D. 732.

Where the action is brought by a lienor other than the contractor, the latter and those who stand between the lienor and contractor through whom he claims, are proper parties defendant. Though they are not made necessary parties by the statute (§ 44) they are necessary in the sense that the court should not undertake to determine the plaintiff's claim to a fund due to them without hearing them, because although the judgment would not be binding upon them, there might result a multiplicity of suits, with conflicting determinations, and thus subject the owner to a double liability. *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376; *Hilton Bridge Co. v. N. Y. C. R. R.*, 145 N. Y. 390; *Maltby & Sons v. Boland*, 152 A. D. 596, 137 N. Y. Supp. 470.

As to actions where the lien has been discharged by undertaking, see §§ 194, 195.

§ 219. Fraudulent conveyances.

Where it is sought to set aside a fraudulent conveyance as an incident to the action, only the last grantee is a necessary party. The intermediate parties are proper, but not necessary. *Bierschenk v. King*, 56 N. Y. Supp. 696, 38 A. D. 360; *Pierce v. Kinney*, 135 N. Y. Supp. 537, 75 Misc. 328; *Cook v. Lake*, 63 N. Y. Supp. 818, 50 A. D. 92.

The grantees of the owner, although fraudulent, may attack the validity of the lien. *Toop v. Smith*, 181 N. Y. 283.

§ 220. The complaint. The contract.

In accordance with the principles set forth under the heading "Extent of Lien," §§ 171 to 176, and the authorities there cited, the complaint must allege:

(1.) The terms of the contract under which the labor was performed or the materials furnished by the lienor, either by stating its legal effect, or annexing a copy of the contract to the complaint, if the contract is in writing.

(2.) (a) Whether the contract was with the owner, the contractor or a sub-contractor;

(b) If the lienor's contract was with a contractor or sub-contractor, the terms of their contracts with each other and with the owner, or if neither the lienor nor his superiors has contracted directly with the owner whose interest it is sought to hold, that such owner has consented to the improvement.

See "Consent of Owner," §§ 135 to 139.

(3.) The performance of each contract referred to or excuse for failure to perform, so as to show a balance due to the lienor at the time of the commencement of the action, either directly from the owner, or from the owner to one through whom the lienor claims, and non-payment of the same.

(4.) That the labor performed or the materials furnished were expended in the improvement of the property against which the lien is claimed.

Thus, in the opinion in the case of *Goodrich v. Gillies*, 17 N. Y. Supp. 88, 62 Hun 479, the court said:

“ It will thus be seen that, in order to entitle a party to file a lien, he must either have performed labor or furnished material towards the performance or completion of a contract made with the city, and such work must be performed or materials used in the execution and completion of the contract, and these requisites are absolutely essential to the existence of a lien, and in their absence no lien can be acquired. It is, therefore, necessary, in order to establish a lien as against the fund, to establish these facts, and in order to entitle the court to grant a judgment enforcing the lien these facts must appear. In the findings of the learned court upon which the judgment in this action was based there is no finding that a single particle of this merchandise which was furnished by the plaintiff to the defendant Gillies was furnished towards the performance or completion of any contract made with the city, or that any part of these materials were used in the execution and completion of any contract with the city. It is true the court found that the defendant Gillies had a contract with the city, and that the plaintiff furnished material to the defendant, but there is no intimation or finding that this material was furnished for the completion of that contract, or had any connection with it, except, perhaps, as it is stated in the lien filed, that all of the materials specified therein had actually been used in the execution and completion of the contract between the defendant Gillies and the city. But this allegation of the notice of claim is not found by the court to be true, and the findings are silent in this respect. It is undoubtedly true

that the court may look into the evidence to support a judgment where there is no express finding upon a particular point. *Marvin v. Mining Co.*, 55 N. Y. 547. But as the case at bar, as already stated, nowhere shows upon its face that all the evidence is contained in the record, the court cannot examine this imperfect record for the purpose of determining whether there is evidence sufficient to justify the finding which is necessary to support the judgment. Upon this point, therefore, the appeal comes up upon the judgment-roll alone. We think, therefore, that, without a finding showing that the material was actually used in the work of the city, no lien could be filed, and the plaintiff was not entitled to a judgment impressing a lien upon the funds of the defendant Gillies in the hands of the city."

The complaint need not allege that the amount of the plaintiff's claim or any part of it was unpaid at the time the notice was filed, but if it does not do so it must allege that something was earned and became due prior to the commencement of the action so that the plaintiff is entitled to enforce his lien against the owner.

In *Maneely v. City of New York*, 105 N. Y. Supp. at 986, 119 A. D. 376, the court says:

"A lienor of the contractor with the owner or city is obliged to allege and show, not only the amount due to him, from the contractor, but also that there was money due and payable to the contractor at the time the lien was filed, or that money subsequently became due and payable to him under the contract; and the lienor's claim is limited by the amount due or that subsequently becomes due to the contractor. *Larkin et al. v. McMullin et al.*, 120 N. Y. 206, 24 N. E. 447; *Van Clief et al. v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Ball & Wood Co. v. Clarke et al.*, *supra*; *Freese*

et al. v. Avery, 57 A. D. 633, 69 N. Y. Supp. 150. Likewise, the lienor of a sub-contractor is obliged to show, not only the amount due from the sub-contractor to him, but also that moneys have become due from the contractor to the sub-contractor which were not paid prior to the filing of the lien, because the lienor of the sub-contractor claims in the right of the sub-contractor; and, under our system of pleading, it is incumbent on the plaintiff, or on a defendant asserting an affirmative claim, to allege all facts essential to his right to recover. *Crane v. Genin*, 60 N. Y. 127; *Lombard v. Syracuse B. & N. Y. R. Co.*, 55 N. Y. 491; *Hagan v. Amer. Baptist Home Mission Society et al.*, 6 N. Y. St. Rep. 212; *Van Clief v. Van Vechten*, *supra*; *French v. Bauer*, 134 N. Y. 548, 32 N. E. 77, 20 L. R. A. 560; *Smack v. Cathedral of Incarnation*, 31 A. D. 559, 52 N. Y. Supp. 168; *Beardsley v. Cook*, 143 N. Y. 143, 38 N. E. 109; *Beecher v. Schuback*, 1 A. D. 359, affirmed 158 N. Y. 687, 53 N. E. 1123."

And in *Wood Mfg. & Realty Co. of L. I. v. Johnstone*, 133 N. Y. Supp. at 423, 148 A. D. 747, the court said:

"In the first count the plaintiff declares as a sub-contractor, but fails to allege that at the time the lien was filed or thereafter any sum of money was due from the owners to the contractor. I think that this was a fatal defect. *Ball & Wood Co. v. Clark & Sons Co.*, 31 A. D. 356, 52 N. Y. Supp. 443; *Brainard v. County of Kings*, 155 N. Y. 538 at page 545, 50 N. E. 263; *Maneely v. City of New York*, 119 A. D. 376-378, 105 N. Y. Supp. 976."

The case of *Palmer Lumber Co. v. Stern*, 125 N. Y. Supp. 594, 140 A. D. 680, seems to hold to the contrary, but the reasoning of the dissenting opinion appears to be sound and sustained by the weight of authority.

But where the complaint is by a sub-contractor it

need not allege the exact amount which is due from the owner to the contractor. It is sufficient that enough is due to cover the plaintiff's claim.

While some amount must be due the lienor at the time his action is commenced, the entire amount claimed need not be due. The plaintiff can recover the amount due at the time of the trial, but cannot recover for a claim arising after the filing of the notice, unless the notice of lien is so prepared as to cover such claims; *i. e.*, services "to be rendered" and materials "to be furnished."

See "Notice of Lien;" "Labor Performed, Materials Furnished and Amount Claimed," § 164.

As to the necessity of securing permission to sue where another action has been brought, see "Two Forms of Action Permissible," § 230.

The notice of lien.

(5.) The complaint must allege and show by annexing a copy, that the notice of lien was filed in conformity with the statute, which sets forth in detail what the notice must contain. *Schillinger Fire Proof Cement Co. v. Arnott*, 14 N. Y. Supp. 326, 86 Hun 618, 152 N. Y. 584.

Description and ownership.

(6.) The complaint should contain a description of the property upon which the lien is claimed, sufficient to determine the exact estate to be sold, and such description may, therefore, be more complete than that contained in the notice of lien, and should also contain an allegation of the ownership property.

See "Notice of Lien," "Description," § 166; *Krauss v. Burnett*, 130 N. Y. Supp. 1086, 73 Misc. 428.

Interest of other lienors.

(7.) The complaint must allege the interest which every other defendant has in the property or fund, by way of lien, mortgage, judgment or conveyance.

See "Parties," §§ 217, 218.

A complaint which fails to allege that a defendant has any interest, adverse to the plaintiff, in the premises or in the controversy, is demurrable as to that defendant. *Tobenkin v. Piermont*, 114 N. Y. Supp. 948.

Other actions.

(8.) The complaint must allege that no other action has been brought to recover the sum claimed.

A failure of such an allegation, however, makes the complaint demurrable only so far as the cause of action for the foreclosure of the lien is concerned. Under § 43, Lien Law, the provisions of the Code of Civil Procedure, §§ 1626 to 1637, relating to actions for the foreclosure of mortgages, apply to actions to enforce mechanic's liens, except as otherwise provided in the Lien Law. This section, 43, in conjunction with §§ 1628 and 1629, Code of Civil Procedure, requires the complaint to show whether any other action has been brought at law to recover any part of the debt, and if so, whether any part thereof has been collected. Therefore, a failure to set forth the allegations required, makes the complaint demurrable as an action for the foreclosure of a lien. But since upon the failure of the lienor to establish his lien he may still recover a personal judgment on contract if the complaint contains sufficient allegations, the demurrer cannot be sustained as to the latter cause of action. *Abbott v. Easton*, 195 N. Y. 372; *Kalt Lumber Co. v. Morgan*, 134 N. Y. Supp. 1098, 150 A. D. 400; *Darmstadt v.*

Mason, 128 N. Y. Supp. 992, 144 A. D. 249; *Schultz v. Teichman Eng. Co.*, 140 N. Y. Supp. 429, 79 Misc. 357; *Douglass v. F. W. Carlin Const. Co.*, 134 N. Y. Supp. 709, 149 A. D. 856.

Special allegations.

(9.) Special circumstances may make it necessary to incorporate in the complaint special allegations relating thereto. Such are the following:

(a.) Preferred payments.

If in violation of the lienor's rights the owner or contractor has collusively made advance payments or altered the terms of the contract, the complaint should set forth the facts, such as an allegation of service of the notice of lien or a demand for the terms of the contract and compliance therewith, sufficient to enable him to offer the necessary proof of such preferences, or alteration of the contract. See "Collusive Payments," § 177; "Service of Notice," §§ 168 and 169; "Right to Demand Contract," § 172.

(b.) Assignments.

If the lien has been assigned it may be necessary to set forth the assignment and filing of the same. See "Assignments," §§ 245 and 246.

(c.) Fraudulent conveyances.

If it is sought to defeat a fraudulent conveyance, mortgage or other incumbrance, the facts relied upon should be alleged. See §§ 177 to 184; see Moore on Fraudulent Conveyances.

(d.) Discharge by bond or deposit.

Where a lien has been discharged by the giving of an undertaking or deposit of money or securities, ap-

propriate allegations should be made to hold the sureties or to sustain a judgment against the deposit. See "Discharge of Liens," §§ 194 and 195.

(e.) Conditions precedent.

Proper allegations should be made as to the compliance with any necessary conditions precedent to the maintenance of the action, such as the acquisition of the necessary license by a plumber. See § 132.

Commencement of action.

(10.) It is not necessary to allege that the action has been commenced within the time prescribed by the statute for the commencement of actions. Such an allegation if made would raise no issue if denied. It is an allegation that the complaint cannot contain if the summons has not already been served. *Romeo v Chiangone*, 110 N. Y. Supp. 724, 126 A. D. 402.

Lis pendens.

(11.) A notice of pendency of action is of the existence of the action. It is improper until the action has been begun, and therefore the complaint is not required to state the filing of the notice, which is to give notice that the action has been begun. *Gass v. Souther*, 61 N. Y. Supp. 305, 46 A. D. 256.

See also "Lis Pendens," § 189.

§ 221. Amendment of complaint.

The court may permit an amendment of the complaint and by so doing does not violate the statute in so far as it requires the action to be commenced within a specified time. *Kalt Lumber Co. v. Morgan*, 134 N. Y. Supp. 1098, 150 A. D. 400.

But the court cannot permit an amendment to the

complaint to the extent of curing a defect in the notice of lien. *Uvalde Asphalt Paving Co. v. City of New York*, 191 N. Y. 244; *Fish v. Anstey Const. Co.*, 130 N. Y. Supp. 927, 71 Misc. 2.

Where the plaintiff fails to allege that no other action has been brought upon the debt as required by § 1629, Code of Civil Procedure, if objection is not taken to the defect by demurrer, the court under § 723 of the Code will permit an amendment of the complaint upon the trial. *Douglass v. F. & W. Carlin Const. Co.*, 149 A. D. 856, 134 N. Y. Supp. 709; *Schultz v. Teichman Eng. & Cont. Co.*, 140 N. Y. Supp. 429, 79 Misc. 357.

Supplemental complaint.

Where a lien has been discharged by the giving of an undertaking after the service of the pleadings, the plaintiff may apply under § 544, Code of Civil Procedure, for leave to serve a supplemental complaint setting forth such facts, and making the sureties parties.

Answers of defendant lienors.

The answers of defendants which set out liens, serve as complaints by such lienors.

See "Answers," § 223.

§ 222. Public improvement liens.

In an action for the foreclosure of a lien under a contract for a public improvement, the practice is substantially the same as that in the case of a mechanic's lien upon real property; § 42, Lien Law. But appropriate allegations of the filing of the notice of lien in the proper offices must be made. See "Liens on Public Improvements," § 207.

And proper allegations should be made of the presentation of the claim against a municipality and of its failure to pay the same. See "Payment and Damages," "Notice before Suit," § 93.

The plaintiff must allege and prove a balance due from the municipality on the contract and to the plaintiff as in the cases of mechanic's liens on real property. *Clapper v. Strong*, 41 Misc. 184, 83 N. Y. Supp. 935, 85 N. Y. Supp. 748, 90 A. D. 546; *Breuchaud v. Mayor of New York*, 16 N. Y. Supp. 347, 61 Hun 564; *Scerbo v. Smith*, 16 Misc. 102, 38 N. Y. Supp. 570, overruling *Drennan v. Mayor of New York*, 35 N. Y. Supp. 244, 14 Misc. 112.

§ 223. The answer.

As a complaint.

Under §§ 44 and 45 of the Statute it is contemplated that as nearly as possible, all issues as to the rights of mechanic's lienors affecting one piece of property, shall be determined by a single action. Any lienor who commences an action is required to make all other lienors and subsequent claimants parties defendant, and the court is authorized to determine the order of priority of different liens as well as any issue raised by any defense or counterclaim. Thus, where a complaint to foreclose a lien alleges that the defendants have filed liens and prays that the respective rights and priorities of all parties be determined, and the answers admit such allegations without asking that any of the liens be declared invalid, the court should receive evidence of the defendant's liens and determine the rights of the parties. *Kelly Lumber Co. v. Otselec Valley R. R. Co.*, 136 A. D. 146, 120 N. Y. Supp. 415; *Hardwick v. Royal Food Co. of New Jersey*, 28 N. Y. Supp. 1086, 78 Hun 52.

But each lienor whose lien is not admitted must set the same forth in his answer or he is deemed to have waived it. Thus, the answers of the defendant lienors become their complaints as to all other parties.

The mere fact that the plaintiff makes an error in pleading or fails to sustain his own lien cannot affect the defendant's rights. Each lien must depend upon its own separate facts and no matter who puts the machinery in motion, each lienor has a right to have his case determined upon the facts which he has pleaded and sustained. *Hill v. Flatbush Consumers' Ice Co.*, 127 N. Y. Supp. 961, 143 A. D. 559. See authorities under "Commencement of Action," § 188.

Where a lienor is made a defendant in an action to foreclose by another lienor, under a general allegation that the defendant has or claims to have some interest in the fund in controversy, such defendant must set out his claim showing through whom he claims and that there is a balance due upon which he can claim, together with any other allegations which would be necessary in a complaint by him. His lien cannot be deemed to be uncontested by the other defendants, since it is not set forth in the complaint, and unless it is set forth in the answer, it will be deemed to be waived under § 44 of the statute. *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376; *Mellen v. Athens Hotel Co.*, 133 N. Y. Supp. 1079, 149 A. D. 534.

§ 224. Service of answer.

But in such a case the defendant must serve his answer upon the contractor and sub-contractor when they are parties, as well as upon all other defendants. Otherwise, if upon the trial the plaintiff decided to discontinue the action, there would be no issues remaining to be tried. § 521, Code of Civil Procedure,

provides for the service of the answer upon all other defendants to be affected by the determination of the issues set forth therein. *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376.

It was likewise held in *Mellen v. Athens Hotel Co.*, 133 N. Y. Supp. 1079, 149 A. D. 534, where the plaintiff in an action to foreclose a lien served the complaint on the hotel company and another defendant lienor. The latter served its answer upon the defendant hotel company, who in turn served an answer denying the defendant lienor's claim, and setting out a counterclaim. The court held that this was the proper practice, and, quoting §§ 44 and 45 of the Statute, said:

"It thus happens that very often as in the present case there are several controversies to be tried arising between co-defendants, and to which the plaintiff has no interest. Under our method of practice a controversy must arise upon pleadings setting forth the claims of the contesting parties, and to meet the case of a controversy between co-defendants the Code of Civil Procedure has provided section 521, as follows:

'Sec. 521. WHEN DEFENDANT TO SERVE COPY ANSWER ON CO-DEFENDANT. Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants, so to be affected who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs.' "

The court then shows that in such a case although both defendants' pleadings are called answers, one may be in the nature of a complaint.

See also *Hinkle v. Sullivan*, 108 A. D. 316, 95 N. Y. Supp. 788.

But it has been held that the only purpose of § 521 is to bring in all parties who are to be affected by the judgment which the plaintiff seeks, and to adjust the controversy as between all parties thereto. Therefore in an action by a sub-contractor to enforce a mechanic's lien where the complaint alleges the execution and delivery by the owner to the contractor of mortgages for the purpose of defeating the Lien Law, and the defendants raise certain issues as between themselves, if the complaint is dismissed, the court is not in a position to go forward with the trial of the action for the purpose of determining such issues. The plaintiff can have no interest in setting aside the mortgages upon the premises unless he has a good and valid lien against the same, and the defendant owners of the premises have no interest in the lien unless it is in fact a lien upon their lands. If there is no lien then there is no controversy in which the plaintiff and defendants are interested, and § 521 does not apply. *Leske v. Wolf*, 138 N. Y. Supp. 859, 154 A. D. 233.

Where lienors are made defendants by another lienor in an action to foreclose, the fact that the owner settles with the plaintiff and secures a discontinuance from him does not deprive the other parties defendant from having a trial of the issues as to their liens. This is so even though the defendant lienors did not serve their answers on the owner. By the service of the complaint and the service of the defendants' answers on the plaintiff, the matters are put in issue. *Wilson v. Niagara City Land Co.*, 29 N. Y. Supp. 517, 79 Hun 162.

And where an action is brought by a material man, lienor, who makes the owner and contractor defendants, the contractor may serve an answer upon the owner admitting non-payment of plaintiff's claim, and alleging an unreasonable refusal of the owner to accept the work done as in performance of the contract, and demanding an adjudication that the materials furnished by the plaintiff and others, and the labor performed, were a full performance of the contract and that the balance claimed be declared to be due and payable. And such an answer may be served by the contractor even though he has previously brought an action against the owner for breach of contract. *Maltby & Sons v. Boland Co.*, 152 A. D. 596, 137 N. Y. Supp. 470.

§ 225. No lien filed by defendant.

But no defendant who has failed to file a lien can recover a judgment in an action to foreclose by another lienor, whether he answers or not. Having filed no lien he has no standing to institute a suit in equity in his own behalf. If he could not bring the action he cannot as a defendant recover affirmative relief. *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376; *Smith v. State*, 118 N. Y. Supp. 780, 65 Misc. 376; *Friedenrich v. Condict*, 109 N. Y. Supp. 526, 124 A. D. 807.

And the owner does not waive his right and permit such a judgment to be taken against him by a failure to object. He has the right to assume that the court will not exceed its power. *Mason's Supplies Co. v. Jones*, 68 N. Y. Supp. 806, 58 A. D. 231, affirmed 172 N. Y. 598.

Supplemental answer.

Where a lien is discharged after the service of an answer by the giving of an undertaking or deposit of

money or securities, the defendant may apply under § 544 of the Code of Civil Procedure for leave to serve a supplemental answer setting forth those facts. *Bulkley v. Kimball*, 19 N. Y. Supp. 672.

Likewise a defendant contractor should be granted leave to serve a supplemental answer showing that after the service of his original answer, a prior trial had resulted in a judgment dismissing the complaint as to the owner, and that the plaintiff had failed to appeal therefrom, and that the owner has subsequently paid the contractor a balance due, as such facts establish a complete defense to the action. *Van Kannel Revolving Door Co. v. Sloane*, 122 A. D. 613, 107 N. Y. Supp. 507.

§ 226. General denial.

Where the action is to foreclose by a material man, the defendant should be permitted to show in defense although not alleged in the answer, that the contractor had not completed the work; the cost of completing the same, and any amounts paid to the contractor. *Frazier v. McGuckin*, 9 N. Y. Supp. 435, 58 Super. 71.

Where a complaint alleges that plaintiff furnished all materials for the building, it is competent for defendant to show under a general denial that he furnished some of the material. *Close v. Clark*, 9 N. Y. Supp. 538, 16 Daly 91.

Where in an action to foreclose a lien against the owners by an assignee of part of a fund due building contractors, the complaint does not allege that the plaintiff performed labor or furnished materials for the work done by the contractors for the defendant, and that the order in question was in payment for such labor and materials, a general denial is sufficient to raise the defense that the assignment was invalid

by reason of a failure to file it as required by § 15 of the statute. *Mason Mfg. Co. v. Adams*, 134 N. Y. Supp. 1100, 76 Misc. 590.

But a defense that an assignment has not been filed as required by § 15 of the Lien Law is insufficient where it does not also allege that prior liens have been filed, as it is presumed that there are no such liens on file, in which case the acceptance would create an equitable assignment. *Tolkow v. Metropolitan Life Ins. Co.*, 133 N. Y. Supp. 367, 73 Misc. 393.

While it is necessary to allege in the complaint that no other action has been brought upon the debt, such an allegation is not part of the plaintiff's cause of action, which must be supported by evidence upon a denial of knowledge or information sufficient to form a belief. Such allegation is for the information of the court upon the trial, and not to raise an issue, which by the mere denial of the allegation, would require the plaintiff to prove the negative of an affirmative defense. Where the defendant fails to raise the objection by demurrer the court will permit an amendment upon the trial. *Douglass v. F. & W. Carlin Const. Co.*, 134 N. Y. Supp. 709, 149 A. D. 856; *Schultz v. Teichman Eng. Co.*, 140 N. Y. Supp. 429, 79 Misc. 357.

§ 227. Counterclaim.

"As a matter of law a counterclaim may be set up in an action to foreclose a lien. *Lumbard v. Railway Company*, 62 N. Y. 290. The lien action is based upon a contract. The particular remedy by foreclosure does not change the nature of the action. A failure to perform the contract causing damages to the owner is the subject-matter of counterclaim within § 501, Code of Civil Procedure." *Bulkly v. Healy*, 12 N. Y. Supp. 54.

See also *Mellen v. Athens Hotel Co.*, 133 N. Y. Supp. 1079, 149 A. D. 534.

The defenses and counterclaims referred to in the Lien Law, § 45, which may be litigated in such an action, are defenses to and counterclaims against the claims sought to be enforced by the lienors. *Smith v. State*, 118 N. Y. Supp. 780, 65 Misc. 376.

But the fact that a plaintiff has filed a mechanic's lien is no defense to an action to recover for work and labor, since the law permitting a personal judgment where the plaintiff fails to establish a lien does not exclude the right to a personal judgment for the debt, if the holder chooses to resort to that remedy. Hence in such an action, the expense of removing the lien and preparing for such anticipated action to enforce the lien, cannot be made the subject of a counterclaim, since these matters "do not arise out of the contract or transaction set forth in the complaint," and are not "connected with the subject of the action." *Biershenk v. Stokes*, 18 N. Y. Supp. 854.

Where the action is brought by the sub-contractor against the contractor, his sureties and the owner of the land affected, the contractor as the primary debtor is entitled to set up a counterclaim as a defense to the action, though the counterclaim exists only in his favor and not in favor of the other defendants. *Cody v. Turn Verein*, 64 N. Y. Supp. 219, 48 A. D. 279.

Where the action is by a sub-contractor no counterclaim for breach of contract by the contractor, arising after the date of the filing of the lien, can be set up against the plaintiff's claim so as to reduce the amount due at the time of the filing of the lien. The lien attaches to what is due at the time of filing and hence that amount cannot be affected by a subsequent breach by the contractor. *Anisansel v. Coggeshall*, 82 N. Y. Supp. 430, 83 A. D. 491; *Valett v. Baker*, 129 A. D. 514,

114 N. Y. Supp. 214; *Kenny v. Monahan*, 66 N. Y. Supp. 10, 53 A. D. 421.

An owner who, after the termination of the original building contract, without fault of the builder, and after the latter had commenced an action to foreclose his mechanic's lien and had assigned the lien and cause of action, but without knowledge of the assignment entered into a new agreement with the assignor, with reference to the same subject-matter, is not entitled to set off against the assignee any damages arising out of the assignor's failure to perform the new contract, but is entitled to set off whatever he actually paid to the assignor upon the assigned claim after the assignment, in good faith and without notice. *Lawrence v. Congregational Church*, 164 N. Y. 115.

Where a public improvement contract provides that if the contractor fails to complete the work in time he shall pay \$20.00 per day as liquidated damages which the city may retain out of the moneys which are due or become due to the contractor, such contract only contemplates payment of liquidated damages where there is a delay in the completion of the contract and not where the contractor abandons his contract, the remedy being limited to the deduction of such liquidated damages from sums due on the contract. Therefore where the contract is abandoned, there being nothing due the contractor, the city cannot maintain a counterclaim for damages for delay. *C. T. Willard Co. v. City of New York*, 142 N. Y. Supp. 11, 81 Misc. 48.

But an action to foreclose a mechanic's lien being founded upon contract, is not subject to a counterclaim for false representations by the plaintiff that he was a competent architect, whereby he induced the defendant to accept improper plans in consequence of

which the defendant suffered a loss, since such a counterclaim sounds in tort. *Marshall v. Cohen*, 32 N. Y. Supp. 283, 11 Misc. 397.

A demurrer to such a counterclaim will be sustained. *Uvalde Asphalt Paving Co. v. Morgan Contracting Co.*, 104 N. Y. Supp. 1118, 120 A. D. 498.

As to the right to a jury trial of issues raised by a counterclaim, see "Jury Trials," § 236.

§ 228. Demurrer.

When a demurrer is interposed in an action for the foreclosure of a lien, if the complaint states a good cause of action for a personal judgment, although defective as an action in foreclosure, the demurrer must be overruled. *Clapper v. Strong*, 41 Misc. 184, 83 N. Y. Supp. 935, 85 N. Y. Supp. 748, 90 A. D. 546; *Schenectady Const. Co. v. Schenectady Ry. Co.*, 94 N. Y. Supp. 401, 106 A. D. 336; *Wood Mfg. Co. v. Johnstone*, 133 N. Y. Supp. 422, 148 A. D. 747; *Jones v. Dodge*, 122 N. Y. Supp. 815, 137 A. D. 853; *Henderson v. Jackson Amusement Co.*, 142 N. Y. Supp. 702, 157 A. D. 572.

This is so even though no demand is made for such other judgment. The right to demur is not given because the complaint does not state facts sufficient to entitle the plaintiff to the relief demanded, but because it does not state facts sufficient to constitute a cause of action—that is any cause of action. § 1207, of the Code of Civil Procedure, providing that the judgment shall not be more favorable to the plaintiff than demanded in the complaint, does not apply where the defendant appears. *Pearce v. Knapp*, 127 N. Y. Supp. 1100, 71 Misc. 324.

In the determination of a demurrer, the complaint proper, and the notice of lien attached thereto must

be considered together, and all the facts therein alleged and every fact that can be reasonably and fairly implied, must stand as admitted. Hence where under the complaint there appear to be two descriptions of the property, it cannot be inferred which of the two is wrong, and until that fact appears as a matter of proof the complaint cannot be passed upon. *Krauss v. Burnett*, 130 N. Y. Supp. 1086, 73 Misc. 428.

The objection that the complaint fails to state whether or not another action has been brought for the recovery of the debt, cannot be taken by answer but must be raised by a demurrer. *Jones v. Dodge*, 122 N. Y. Supp. 815, 137 A. D. 853; *Abbott v. Easton*, 195 N. Y. 372; *Schwartz v. Klar*, 128 N. Y. Supp. 830, 144 A. D. 37; *Douglass v. F. W. Carlin Const. Co.*, 134 N. Y. Supp. 709, 149 A. D. 856.

And even if it appears that another action has been commenced for the collection of the debt, that fact does not make a complaint for the foreclosure of the lien demurrable, unless a judgment has been obtained and collected. *Power v. Onward Const. Co.*, 80 N. Y. Supp. 950, 39 Misc. 707; *Pierce v. Kinney*, 137 N. Y. Supp. 475, 152 A. D. 638, reversing 135 N. Y. Supp. 537, 75 Misc. 328.

A complaint improperly unites causes of action when it joins with an alleged cause of action for the foreclosure of a lien for a certain sum, a further alleged cause of action for work, labor and services for which payment became due after the filing of the lien. *Schillinger Fire Proof Cement Co. v. Arnott*, 14 N. Y. Supp. 326, 154 N. Y. 584; *Freese v. Avery*, 57 A. D. 633, 69 N. Y. Supp. 150.

A plea of non-joinder of proper parties defendant, without pointing out the precise defect or bringing the matter to the attention of the trial court, or show-

ing that a complete determination of the controversy cannot be had without the presence of an additional party is ineffectual. *Hawkins v. Mapes Reeve Const. Co.*, 178 N. Y. 236.

§ 229. Practice.

In courts of record the form of action, the enforcement of the judgment by foreclosing the rights of the parties, the awarding of a deficiency judgment against persons liable for the debt, and all proceedings, are in all respects the same in an action for the foreclosure of a mechanic's lien as in the foreclosure of a mortgage upon real estate in a court of equity. § 43, statute; Code of Civil Procedure, §§ 1626 to 1637; *Kenny v. Apgar*, 93 N. Y. 539; *Faville v. Hadcock*, 39 Misc. 397, 80 N. Y. Supp. 23; *Cody v. Turn Verein*, 64 N. Y. Supp. 219, 48 A. D. 279, affirmed 167 N. Y. 607; *Valett v. Baker*, 129 A. D. 514, 114 N. Y. Supp. 214; *Abbott v. Easton*, 106 N. Y. Supp. 970, 122 A. D. 274; see 195 N. Y. 372, reversing on another point.

Commencement of actions.

The regulations respecting the commencement of actions will be found at § 188.

Lis pendens.

See § 189.

§ 230. Two forms of action permissible.

The remedies given under the mechanic's lien law are not exclusive and do not bar the lienor from pursuing any other and further remedy which he has independent of the statute. He may pursue his remedies, one to recover the debt, and the other to enforce the lien, simultaneously and independently,

but he can have but one satisfaction of his claim. It has been so held in the following cases: *Power v. Onward Const. Co.*, 39 Misc. 707, 80 N. Y. Supp. 950; *Biershenk v. Stokes*, 18 N. Y. Supp. 854; *Teeman v. Lustbader*, 55 Misc. 535, 105 N. Y. Supp. 941; *Pierce v. Kinney*, 137 N. Y. Supp. 475, 152 A. D. 638, reversing 135 N. Y. Supp. 537, 75 Misc. 328.

And the provisions of the Lien Law permitting a personal judgment are permissive not mandatory. So that if an issue as to the right to the lien is tried, but the issue as to the lienor's right to a personal judgment upon the contract is not tried, the judgment will not be *res adjudicata* as to such issue and a second action may be brought. *Koeppel v. MacBeth*, 89 N. Y. Supp. 969, 97 A. D. 299.

Where an action is brought to foreclose a lien and the plaintiff recovers only for extra work, but his claim for a lien under the contract is dismissed on the merits, he cannot then bring an action on *quantum meruit* to recover the reasonable value of the work. The first action has finally adjudicated the issue as to his rights under the contract. *Maeder v. Wexler*, 90 N. Y. Supp. 598, 98 A. D. 68.

None of the foregoing cases, however, discussed the effect of § 1628, Code of Civil Procedure, on the rights of a lienor to bring a second and independent action to recover upon the contract. If the action at law is commenced first, permission to institute an action to foreclose the lien is of course unnecessary, but the fact that such an action has been brought must be alleged in the complaint. See "Complaint," § 220, subdivision 8; "Demurrer," § 228.

In the case of *Brown v. Kight*, 116 N. Y. Supp. 592, 63 Misc. 58, an action was pending in the City Court of New York for the foreclosure of a lien which had been bonded. Subsequently an action on the debt was

commenced, in the municipal court, which could be tried before the foreclosure case. A motion was made in the city court for a stay of the second action, it being claimed that § 1629, Code of Civil Procedure, was violated. That section reads:

“While an action to foreclose a mortgage upon real estate is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt without leave of the court in which the former action was brought.”

The court said:

“This section was passed to prevent vexatious and oppressive litigation, but it can hardly be said that the institution of an action in the municipal court for work, labor and services, and not founded upon the statute as is the lien in this case, is oppressive. Rather, upon the facts in this case, the court believes that as a speedy determination can be had in the tribunal last selected by the plaintiff he should be permitted to proceed to a trial therein instead of awaiting the hazard and delay in reaching the action here.” . . . “Since the court can give permission there is no reason why it should not allow an action already commenced to be continued without discontinuing and starting a new one.” Citing *McKernan v. Robinson*, 84 N. Y. 105.

§ 231. Right to stay.

Where issues are raised between defendants in an action to foreclose a mechanic's lien, such controversy cannot interfere with the plaintiff's rights nor stay his right to a trial. § 521, Code of Civil Procedure; *Mellen v. Athens Hotel Co.*, 133 N. Y. Supp. 1079, 149 A. D. 534.

Where an action is pending in a court of record to foreclose a lien, the court will not stay an action upon

the debt subsequently brought in a court not of record, since the parties are different and a quicker trial can be had in the second action, and a recovery on a judgment awarded in such action will be a bar to the lien action. *Brown v. Kight*, 116 N. Y. Supp. 592, 63 Misc. 58.

A personal action upon the debt by one who has not filed a lien and therefore cannot be given a judgment in a suit pending for the foreclosure of a lien, will not be stayed. The same relief is not sought in both actions. *Nussberger v. Wasserman*, 81 N. Y. Supp. 295, 40 Misc. 120; *Thomas v. Bronx Realty Co.*, 60 A. D. 365, 70 N. Y. Supp. 206.

§ 232. Injunction.

Where the plaintiff fitted certain buildings belonging to the defendant, but in the possession of leasehold tenants, with steam boilers and piping, and then claimed a lien on the tenant's estate in the premises, the tenant having abandoned and the landlord re-entered, it was held that an injunction should not be granted to restrain the owner from using the property for which the lien was claimed. If the materials furnished were not fixtures, they were not covered by the lien, if they were part of the realty they were rightfully in the possession of the landlord. *Chamberlain v. McCarthy*, 13 N. Y. Supp. 217, 59 Hun 158.

In the case of *In re Simonds Furnace Co.*, 61 N. Y. Supp. 974, 30 Misc. 209, it was held:

“A provision in an order appointing a receiver of a corporation enjoining all persons, and especially creditors of such corporation, from bringing any action against said corporation for the recovery of money, does not prohibit the filing of a lien by one of its creditors upon the property of a third party to

whom such corporation supplied material which it had bought from such creditor, but for which it had failed to pay.”

See also *Jackson v. Bunnell*, 113 N. Y. 216, 17 C. P. 79; see Joyce on Injunctions.

§ 233. Notice of trial.

Where one of several defendants fails to serve a co-defendant with a notice of trial he can have no relief against him. *Mahoney v. McWalters*, 36 N. Y. Supp. 149, 91 Hun 247.

Where in an action to foreclose a mechanic's lien, another lienor serves an answer upon his co-defendants, but no notice of trial is given him, and the other defendants obtain a dismissal of the complaint, it is proper to grant the defendant lienor's motion to vacate the dismissal and to restore the action in order that he may try the issues between himself and his co-defendants. *Hinkle v. Sullivan*, 95 N. Y. Supp. 788, 108 A. D. 316.

§ 234. Examination before trial.

Where a lien is filed against a balance claimed to be due over and above the cost of completion by the owner, it is part of the lienor's case to prove what the cost of the completion of the building was and what balance is due. The mere fact that more than the contract price has been expended in completing the building, does not show that there is nothing to which a lien may attach. The owner is only entitled to credit such sum as was necessarily expended in completing the building as the specifications and plans required.

Therefore the lienor is entitled to an order for the examination of the owner before trial under § 872, Code of Civil Procedure, to learn what that balance

was. The fact that a bill of particulars has been served will not preclude the order. *Tisdale Lumber Co. v. Droge*, 131 N. Y. Supp. 683, 147 A. D. 55.

§ 235. Calendar preferences.

Under rule XI of the special rules of practice in the first judicial department, in an action to foreclose a mechanic's lien either party may apply to special term, part III, upon notice of two days to the adverse party, to have the case placed upon the preferred calendar; and the court may so order if it appears that the trial will not be a protracted one or that for any special reason the case should be promptly disposed of.

See § 791, Code of Civil Procedure.

By rule IX of the County Court, Bronx County, actions to foreclose mechanic's liens may be preferred upon two days' notice of motion.

§ 236. Jury trials.

An action for the foreclosure of a mechanic's lien is a suit in equity to be tried, as are actions for the foreclosure of mortgages on real estate, by a court without a jury, except where the issues are framed and sent to a jury. The proper remedy of a party who desires a jury trial upon issues of fact in such an action is to apply to the court under § 823, Code of Civil Procedure. The constitutional provisions with reference to trials by jury do not apply. And the fact that the lien has been discharged by undertaking or deposit does not change the rule. *Kenny v. Apgar*, 93 N. Y. 539; *Schillinger Fire Proof Cement Co. v. Arnott*, 152 N. Y. 584; *Smith v. Fleischman*, 48 N. Y. Supp. 234, 23 A. D. 355.

Where the sole issues raised are by the plaintiff's

complaint demanding foreclosure of the lien or on failure of the lien a personal judgment against the defendant, and the answer does not assert a counterclaim, the law as to the rights of the parties to a jury trial is clear.

The provisions of the statute, § 54, entitling the plaintiff to a personal judgment where the lien fails, do not impair the defendant's right to a jury trial. If the lien is held to be invalid the action resolves itself into one on contract demanding judgment "for a sum of money only" (§ 968, Code of Civil Procedure) and the defendant is entitled to a jury trial of the issues arising upon the contract upon which a personal judgment is demanded, provided he has not waived his right thereto by a failure to demand such a trial seasonably. See § 237, and Rule 31, General Rules of Practice. Where the validity of the lien is controverted and there is danger that a personal judgment may be taken against the defendant, there are two methods by which the right to a jury trial may be preserved.

First, the issues may be framed and tried by jury in advance of the trial of the issues at special term under §§ 970 and 974 of the Code of Civil Procedure, and this would appear to be the wiser course. Such a motion if seasonably made must be granted. *Di Menna v. Cooper & Evans*, 140 N. Y. Supp. 680, 155 A. D. 501.

Second, the issues at special term may first be tried with the understanding that if the lien be declared invalid, an interlocutory judgment to that effect will be given, and the issues upon which a personal judgment depends will be sent to trial term for trial by a jury. Unless a defendant preserves his right to a jury trial in one of these ways he will be considered to have waived the same, and the court at special term can

enter a personal judgment on failure of the lien. *Hawkins v. Mapes-Reeve Const. Co.*, 81 N. Y. Supp. 798, 82 A. D. 72; *Steuerwald v. Gill*, 83 N. Y. Supp. 396, 85 A. D. 605; *Di Menna v. Cooper & Evans*, 140 N. Y. Supp. 680, 155 A. D. 501.

Where the answer pleads a counter-claim for damages against the plaintiff, the rights of the defendant to a trial by jury are not so easily determined. The statutory provisions which fix the rights of the parties are to be found in §§ 24 and 45, Lien Law, and §§ 968 to 974 and 1008 and 1009 of the Code of Civil Procedure, as follows:

LIEN LAW.

"§ 24. Enforcement of mechanic's lien.

The mechanics' liens specified in this article may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded, as prescribed in article three of this chapter."

"§ 45. Equities of lienors to be determined.

The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action."

CODE OF CIVIL PROCEDURE.

"§ 968. What issues of fact are triable by a jury.

In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed:

1. An action in which the complaint demands judgment for a sum of money only.
2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel."

"§ 969. What issues are triable by the court.

An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed."

“ § 970. Order for trial by jury, of specific questions of fact, when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order directing all the questions arising upon those issues to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same as where questions arising upon the issues are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted.”

“ § 971. Id.; when discretionary.

In an action, where a party is not entitled, as of right, to a trial by a jury, the court may, in its discretion, upon the application of either party, or without application, direct that one or more questions of fact, arising upon the issues, be tried by a jury, and may cause those questions to be distinctly and plainly stated for trial accordingly.”

“ § 972. Trial of the remainder of the issues.

If the questions, directed to be tried by a jury, as prescribed in the last two sections, do not embrace all the issues of fact in the action, the remaining issues of fact must be tried by the court, or by a referee.”

“ § 973. Separate trial of one or more issues.

The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case.”

“ § 974. Counterclaim to be deemed an action, within the foregoing sections.

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action, stated in the counterclaim, and demanding the same judgment.”

“ § 1008. If trial by jury waived, action must be tried by the court.

In an action triable by a jury, if the parties waive the trial, by a jury, of the issue of fact, the action must be tried by the court, without

a jury; unless a reference is directed, in a case prescribed by law. (1) But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. (2) His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section."

"§ 1009. Trial by jury; how waived.

' A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:

1. By failing to appear at the trial.
2. By filing with the clerk a written waiver, signed by the attorney for the party.
3. By an oral consent in open court, entered in the minutes.
4. By moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial."

As to whether the defendant when the answer sets up a counterclaim to an equitable cause of action, has such an absolute and unqualified right to a jury trial that it may be preserved by moving for such a trial when the case is called at special term for trial, or whether he must move to frame the issues under § 970 of the Code, and whether when such a motion is made it must be granted, the authorities are in conflict. *

The case of *MacKellar v. Rogers*, 109 N. Y. 468, is often cited as an authority to the effect that the defendant's right is contingent upon his moving to frame the issues under § 970. But the decision in this case was also based upon the fact that the defendant had himself noticed the issues for trial at special term, and thereby waived his right to the jury trial, since the only issues raised were under the counterclaim, the allegations of the complaint being admitted. The finality of the decision on the first point has been since questioned for this reason. See *Herb v. Metropolitan Hospital & Dispensary*, 80 N. Y. Supp. 552, 80 A. D. 145, and *Bradley & Currier v. Herter*, 23 C. P. 408, 30 N. Y. Supp. 270.

In the case of *Herb v. Metropolitan Hospital and Dispensary*, the decision, by a divided court, also holds that the defendant does not lose his right to the jury trial by a failure to move under § 970. It is there said that the making of the motion is permissive, but the granting of it is mandatory. The opinion also intimates that where the complaint is admitted, and the only issues to be tried arise out of the counterclaim, that the defendant should be entitled to notice the case for trial immediately at trial term. These expressions of opinion were, however, unnecessary to the decision of the case, since a motion had been made to frame issues under § 970, and the court holds, that regardless of consideration of the other points discussed, this motion should have been granted. However, whether or not the defendant under such circumstances has such an absolute and unqualified right to a jury trial, that he may await to assert his demand for the same until the case is called for trial at special term, it appears to be well established that he has such a right that if the motion to frame the issues is made under § 970 of the Code, it is mandatory upon the court to grant the same. And it was therein further held that the motion under § 970 need not be made within ten days of the joining of issue, as was then required where the granting of the motion was discretionary, under Rule 31 of the General Rules of Practice.

At the time of the decision, here cited, Rule 31 read as follows:

"In cases where the trial of issues of fact is not provided for by the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated

in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure."

Probably with a view to finally determining the questions here stated the rule was amended in 1910 and now provides as follows:

"In all actions where either party is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle them. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure."

The effect of this amendment upon the character of cases referred to has not yet been fully determined. In the case of *Cohen v. Cohen*, 145 N. Y. Supp. 652, 160 A. D. 240, it was held, by a divided court in the Appellate Division, First Department, that under rule 31, as amended, an application to frame issues, in an action for divorce, must be made within 20 days of the joining of the issues. The dissenting opinion in the latter case appears to be the sound one. And in a more recent case of the same kind, in the Appellate Division of the Second Department, the contrary rule was laid down by a unanimous court in the opinion of which the *Cohen* case was referred to and disapproved. *Halgren v. Halgren*, 145 N. Y. Supp. 987, 160 A. D. 477.

Therefore the validity of rule 31 may still be doubted, if it is sought thereby to require that a defendant setting forth a counterclaim, in an action

to foreclose a mechanic's lien, who desires a jury trial, shall be compelled to move for a settlement of the issues under § 970 of the Code within 20 days after the joining of issue.

The justices of the supreme court derive their power to make rules of practice from § 94 of the Judiciary Law, but their authority to do so is limited to such rules as are not inconsistent with the Code of Civil Procedure. *Gormerly v. McGlynn*, 84 N. Y. 284. See also dissenting opinion in *Cohen v. Cohen* (*supra*). And as the court said in *Herb v. Metropolitan Hospital*, 80 A. D. 145, 80 N. Y. Supp. 552, which was an action to foreclose a mortgage on real property: "Where there is an absolute right to have the issues settled, I think it quite clear that rule 31 of the general rules of practice has no application, and if it did it would be inoperative so far as in conflict with the Code."

Bradley & Currier v. Herter, 23 C. P. 408, 30 N. Y. Supp. 270, was decided before the amendment of rule 31. But if the foregoing statement from *Herb v. Metropolitan Hospital* is sound, then the following extract from the opinion in the *Bradley* case is relevant, as supporting the contention here made, that rule 31 has no application to the cases stated.

"In an action to enforce a mechanic's lien, it is imperative on the court to grant an application, seasonably made, for trial by jury of questions of fact arising on a counterclaim for damages. See *Deeves v. Metropolitan Realty Co.*, 6 Misc. 91, 26 N. Y. Supp. 23. The plaintiff, however, contends that defendant has waived his right to a trial by jury by reason of laches; and plaintiff's counsel cites *MacKellar v. Rogers*, 109 N. Y. 468, 17 N. E. 350, affirming 52 N. Y. Super. Ct. 468, in support of his contention. But I hardly think that case can be held to apply to this

motion, because in that case it was held that defendant had waived his rights, for the reason that he had himself noticed the cause for trial at special term, and he did not make his motion for a jury trial until the cause was reached for trial at the special term. In the case at bar the defendant is not guilty of either of these acts of waiver.

Nor do I think that rule 31 of the general rules of practice sustains plaintiff's position for that applies only to cases where the trial of issues of fact is not provided for by the Code *and the motion here under consideration is covered by the provisions of §§ 970 and 974 of the Code.*"

The motion was made by the defendant for an order directing that issues raised by a counterclaim be framed under § 970 of the Code, for trial by jury.

The case of *Deeves v. Metropolitan Realty Co.*, mentioned in the foregoing opinion was affirmed without opinion in 141 N. Y. 587.

See also *McAleer v. Sinnott*, 51 N. Y. Supp. 956, 30 A. D. 138; *Herb v. Metropolitan Hospital and Dispensary*, 80 N. Y. Supp. 552, 80 A. D. 145, and cases cited, wherein the rule laid down in *Arnot v. Nevins*, 60 N. Y. Supp. 401, 44 A. D. 61 was retracted, and *Di Menna v. Cooper*, 140 N. Y. Supp. 680, 155 A. D. 501.

In the opinion in the case of *Gersmann v. Walpole*, 79 Misc. 49, 139 N. Y. Supp. 1, decided by the Appellate Term, First Department, it is said that a jury trial of the issues raised by a counterclaim in an equity suit is discretionary, and that the order must be applied for within ten days after joinder of issue. The case was decided after the amendment of rule 31, but the court made no reference to the change in the rule. The decision does not appear to be well founded. The cases of *MacKellar v. Rogers*, 109 N. Y. 468, and

Smith v. Fleischman, 23 A. D. 355, 48 N. Y. Supp. 234, cited in the opinion, both support the position that under the circumstances stated, a jury trial is not such an absolute right that a motion to frame issues is unnecessary; but neither of these cases holds that the right is not absolute in the sense that such motion need not be granted, if the party takes the necessary preliminary steps to secure his right by a motion to frame the issues. The other case cited in the opinion, *Arnot v. Nevins*, 44 A. D. 61, 60 N. Y. Supp. 401, has been overruled in *Herb v. Metropolitan Hospital & Dispensary*, 80 N. Y. Supp. 552, 80 A. D. 145.

Though most of the cases deal with an application by the defendant for a trial by jury, the application may be by the plaintiff, and if properly made, should be granted. *Di Menna v. Cooper & Evans*, 140 N. Y. Supp. 680, 155 A. D. 501.

See also *Schwartz v. Klar*, 128 N. Y. Supp. 830, 144 A. D. 37; *Ettinger v. Trustees Sailor's Snug Harbor*, 107 N. Y. Supp. 783, 122 A. D. 681.

§ 237. Waiver of jury trial.

The Code of Civil Procedure by § 1009 specifies certain modes by which the trial by jury may be waived.

“ But the provision is not exclusive, and the same effect may be given to any evidence either of conduct or acquiescence by a party, which in other cases would require a conclusion that a right designed for his benefit had been waived.” *MacKellar v. Rogers*, 109 N. Y. 468.

There it was held that the defendant had waived his right by noticing the issues for trial at special term, when the issues raised by the counterclaim were the only ones to be tried. *Werner v. Mohawk Condensed Milk Co.*, 152 A. D. 334, 136 N. Y. Supp. 585.

Likewise the right may be waived by a failure to appeal from an order of reference. *Baird v. Mayor of New York*, 74 N. Y. 382.

A failure to demand a trial by jury prior to a mere statement by counsel, does not amount to a waiver by going to trial, since the statement is not evidence. *Herb v. Metropolitan Hospital & Dispensary*, 80 N. Y. Supp. 552, 80 A. D. 145.

See also *Westgate v. Shirley*, 42 Misc. 245, 86 N. Y. Supp. 593; *Abbott v. Easton*, 195 N. Y. 372; *Spring v. Collins Bldg. Co.*, 60 Misc. 239, 113 N. Y. Supp. 29; *Pearce v. Knapp*, 71 Misc. 324, 127 N. Y. Supp. 1100; *Butterly v. Deering*, 158 A. D. 181, 142 N. Y. Supp. 1050.

Reference should also be made in this connection to Rule 31 of the General Rules of Practice cited under § 236 of the text.

§ 238. References.

A reference may be had by consent of the parties under § 1011, Code of Civil Procedure; *Butterly v. Deering*, 158 A. D. 181, 142 N. Y. Supp. 1050, but a reference cannot be ordered except in cases where the examination of a long account is necessarily involved; § 1013, Code of Civil Procedure. A mere statement that an examination of a long account is necessary is not sufficient, and the burden of showing the facts warranting the reference is upon the party applying. *Cassidy v. McFarland*, 139 N. Y. 201; *Spence v. Simis*, 137 N. Y. 616; *Importers & Traders Nat'l Bank v. Werner*, 66 N. Y. Supp. 996, 54 A. D. 435; *Bentz v. Carleton Hovey Co.*, 100 N. Y. Supp. 206, 114 A. D. 865.

But in an action to foreclose a mechanic's lien, where the plaintiff's cause of action is referable, but a counterclaim is set out in which the issues are triable

by a jury, the court has no power over the defendant's objection to refer the counterclaim along the cause of action. *Deeves v. Metropolitan Realty Co.*, 26 N. Y. Supp. 23, 6 Misc. 91, affirmed 141 N. Y. 587; *McAleer v. Sinnott*, 51 N. Y. Supp. 956, 30 A. D. 318; *Hoffman House v. Hoffman House Cafe*, 55 N. Y. Supp. 763, 36 A. D. 176.

In this respect equity actions differ from actions at law, wherein no reference may be had unless it be of all issues in the action. *Claffey v. Madison Ave. Co.*, 109 N. Y. Supp. 1, 124 A. D. 774.

An action to foreclose a mechanic's lien is a suit in equity, and a trial on the main issue should be had before the court, prior to a reference for the examination of a long account. *O'Brien v. N. Y. Butchers' Co.*, 54 Misc. 297, 105 N. Y. Supp. 950.

The findings of the referee are final only as to matters referred. Any judgment rendered by him must be within the authority conferred upon him. *Hoffman House v. Hoffman House Cafe*, 67 N. Y. Supp. 601, 33 Misc. 423.

§ 239. Judgments.

“§ 57. Judgment may direct delivery of property in lieu of money.

If the owner has agreed to deliver bills, notes, securities or other obligations or any other species of property, in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, and the property affected by the lien cannot be sold, by virtue of such judgment, except in default of the owner to so deliver or deposit within the time directed by the court.”

“§ 58. Judgment for deficiency.

If upon the sale of the property under judgment in a court of record there is a deficiency of proceeds to pay the plaintiff's claim, judgment may be docketed for the deficiency against any person liable therefor, who shall be adjudged to pay the same in like manner and with like effect as in judgments for deficiency in foreclosure cases.”

“ § 60. Judgment in action to foreclose lien on account of public improvement.

If, in an action to enforce a lien on account of a public improvement, the court finds that the lien is established, it shall render judgment directing the state or the municipal corporation to pay over to the lienors entitled thereto for work done or material furnished for such public improvement, and in such order of priority as the court may determine, to the extent of the sums found due the lienors from the contractors, so much of the funds or money which may be due from the state or municipal corporation to the contractor, as will satisfy such liens, with interest and costs, not exceeding the amount due to the contractor.”

“ § 61. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation.

If the lien is for labor done or materials furnished for a railroad corporation, upon its land, or upon or for its track, rolling stock or the appurtenances of its railroad, the judgment shall not direct the sale of any of the real property described in the notice of the lien, but when in such case, a judgment is entered and docketed with the county clerk of the county where the notice of lien is filed, or a transcript thereof is filed and docketed in any other county, it shall be a lien upon the real property of the railroad corporation, against which it is obtained, to the same extent, and enforceable in like manner as other judgments of courts of record against such corporation.”

The provisions of the Code of Civil Procedure, §§ 1626 to 1637, relative to the foreclosure of mortgages apply to actions for the foreclosure of mechanic's liens, but since the lien is not upon the real property, but upon the interest of the owner named in the notice of lien, the judgment may only direct the sale of the owner's interest in the property.

And where the lien has been discharged by undertaking or deposit of moneys or securities the action being only in form for foreclosure, instead of directing the sale of the owner's interest in the property the judgment should direct the payment of the amount found to be payable upon the lien either by the sureties upon the undertaking or out of the deposit made.

And the object of § 57 is apparently to permit the court to fix a time within which the deposit of moneys or securities in discharge of the lien may be made. Under §§ 20 and 55 of the statute an order may be made permitting the discharge of the lien upon the deposit of moneys or securities. But the order need not direct that the lien must be so discharged and the owner may not take advantage of the order after it is obtained. Therefore when the time for the entry of judgment arrives the real property may be still chargeable with the lien, with the possibility of discharge at any time by a deposit of moneys or securities.

See §§ 191 to 200.

Where on the foreclosure of a mechanic's lien other lien holders join in the suit, only one decision and decree should be presented embracing all liens, covering substantially all issues decided and declaring the priority of the different liens. *Hall v. Long*, 68 N. Y. Supp. 522, 34 Misc. 1.

A motion by a defendant lienor for judgment against the owner is unnecessary; and therefore the fact that such a party moves for judgment in favor of the plaintiff contractor for the full amount of his lien, and that out of that sum be carved his own interest, does not deprive him of such judgment as he is entitled to. *Schultze v. Goodstein*, 81 N. Y. Supp. 946, 82 A. D. 316.

When a lienor is made a party defendant in an action to foreclose a prior mortgage, he need not set up his lien affirmatively, but may default so far as the answer is concerned and await the sale and then make a claim upon the surplus moneys if any, under Rule 64 of the General Rules of Practice. The question of priority of claims will then be heard and determined.

See rules 61 and 64 of General Rules of Practice and § 1633, Code of Civil Procedure.

In such a case where the action is brought for the foreclosure of a prior mortgage, lienor defendants must, where the liens would otherwise expire by lapse of time, secure extensions of the same by order. See § 190.

In an action of foreclosure, the interests of the parties become barred and foreclosed not upon the entry of the judgment, but upon the sale and conveyance of the land; and only liens in existence at the time of the sale and conveyance are transferred to the surplus moneys arising therefrom, and if at that time no lien exists, there is nothing which can be transferred to the fund. If at the time of the sale to which a junior judgment lienor was a party, ten years have elapsed since such party's judgment became a lien, it is not payable out of the surplus, even though the ten years had not elapsed at the time of the entry of judgment in foreclosure. And a judgment in foreclosure, while final for all purposes of review, is in other respects interlocutory, and parties to the action having judgment liens upon the property, may sell it upon execution notwithstanding the judgment prior to the foreclosure sale. *Nutt v. Cuming*, 155 N. Y. 309; *Terry v. Fuller*, 112 N. Y. Supp. 450.

A judgment which reserves nothing for the further determination of the court is a final judgment, even though some further action by a referee may be necessary to carry it into effect. *Bentley v. Gardner*, 27 Misc. 674, 58 N. Y. Supp. 824.

Objection to the form of judgment which may be corrected by motion cannot be raised for the first time upon appeal. *D'Andre v. Zimmerman*, 17 Misc. 357 and 16 Misc. 499.

As to the issuance of a writ of assistance in aid of judgment see *O'Connor v. Schaeffel*, 11 N. Y. Supp.

737, and *Burnham v. Raymond*, 72 N. Y. Supp. 300, 64 A. D. 596.

§ 240. Personal judgment.

STATUTE.

“§ 54. Judgment in case of failure to establish lien.

If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.”

“§ 45. Equities of lienors to be determined.

The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action.”

A personal judgment can only be recovered against those liable upon the debt under the contract, and such liability must be established as in a common law action. The complaint must allege facts which establish the individual liability on contract, of the defendant against whom such judgment is sought. Thus, where the lienor has not contracted directly with the owner, he can have no personal judgment against him, but only a claim against the owner's interest in the real property in the event that he establishes a lien, and a personal claim against those with whom he contracted and who have promised to pay the debt. *Orr v. Wolff*, 75 N. Y. Supp. 549, 71 A. D. 614; *Daxe v. Hajek*, 107 N. Y. Supp. 601, 56 Misc. 673; *Aex v. Allen*, 94 N. Y. Supp. 844, 107 A. D. 182; *Kane v. Hutkoff*, 81 N. Y. Supp. 85, 81 A. D. 105; *Abbott v. Easton*, 195 N. Y. 372; *Schwartz v. Klar*, 128 N. Y. Supp. 830, 144 A. D. 37; *Weiss v. Kenny*, 59 Misc. 279, 112 N. Y. Supp. 287; *Spring v. Collins Bldg. Const. Co.*, 113 N. Y. Supp. 29, 60 Misc. 239; *Alexander v. Hollander*, 94 N. Y. Supp. 796, 106 A. D. 404; *Mitchell v. Dunmore*

Realty Co., 141 N. Y. Supp. 93, 156 A. D. 117; *Tradesman's Nat'l Bank v. Boldt*, 139 N. Y. Supp. 531, 155 A. D. 72.

A subsequent grantee cannot therefore be made personally responsible for the debt. *Gilmour v. Calcourt*, 183 N. Y. 342; *Tradesman's Nat'l Bank v. Boldt*, 139 N. Y. Supp. 531, 155 A. D. 72.

The complaint need not demand a personal judgment. *Pearce v. Knapp*, 127 N. Y. Supp. 1100, 71 Misc. 324; *Schenectady Cont. Co. v. Schenectady Ry. Co.*, 94 N. Y. Supp. 401, 106 A. D. 336.

It is immaterial for what reason the lien fails, even if the lien proves to be fatally defective; if the plaintiff alleges and shows a common law liability he is entitled to a personal judgment. *Shaw v. Wilke*, 121 N. Y. Supp. 745, 137 A. D. 513; *Jones v. Dodge*, 122 N. Y. Supp. 815, 137 A. D. 853.

Even where it is shown that the lien has been waived, a personal judgment may be obtained. *Woolf v. Schaefer*, 103 A. D. 567, 93 N. Y. Supp. 184.

But no such judgment can be recovered by a party who has not filed a lien. Thus, a contractor who has filed no lien but who is made a defendant in an action to foreclose by a lienor, cannot recover a personal judgment against the owner. It is only where the party has filed a lien that he is entitled to personal judgment on failure to establish the lien. *Friedenrich v. Condict*, 109 N. Y. Supp. 526, 124 A. D. 807; *Nussberger v. Wasserman*, 81 N. Y. Supp. 295, 40 Misc. 120; *Maneely v. City of New York*, 105 N. Y. Supp. 976, 119 A. D. 376; *Mason's Supplies Co. v. Jones*, 68 N. Y. Supp. 806, 58 A. D. 231, affirmed 172 N. Y. 598; *Smith v. State*, 118 N. Y. 780, 65 Misc. 376.

Personal judgments may likewise be rendered in actions for the foreclosure of liens upon public improvements. *Uvalde Asphalt Co. v. City of New York*,

191 N. Y. 244; *Terwilliger v. Wheeler*, 81 N. Y. Supp. 173, 81 A. D. 460.

The provisions of the statute allowing a personal judgment are permissive; they authorize the lienor to litigate the issues with reference to claims not covered by the lien, but do not require it. *Koeppel v. MacBeth*, 89 N. Y. Supp. 969, 97 A. D. 299.

The provisions of § 54 do not impair the defendant's right to a jury trial.

See "Jury Trials," § 236.

By express provision of § 17 of the statute, failure to file a *lis pendens*, while fatal to the lien, does not prohibit a personal judgment.

It should be noted that personal liability to a lienor may also arise by reason of a refusal of an owner to correctly disclose the terms of his contract with his contractor. See § 172.

;

§ 241. Appeals.

Where judgment is given that the lien filed is fatally defective and the plaintiff does not appeal therefrom, he cannot upon an appeal by the owner apply in the appellate court for an order curing the defective lien. *Morgan v. Taylor*, 5 N. Y. Supp. 920, 15 Daly 304, affirmed 128 N. Y. 622.

A lienor may appeal from a judgment refusing a personal judgment against the contractor, without appealing from the judgment in favor of the owner discharging the lien because nothing is due from him. *Murdock v. Jones*, 3 A. D. 221, 38 N. Y. Supp. 461.

Objections to the undertaking given to discharge a lien cannot be raised for the first time upon appeal; and the same rule holds as to the form of a judgment which is subject to motion for correction. *D'Andre v. Zimmerman*, 17 Misc. 357, 16 Misc. 499.

Where a case is tried on the merits, the objection

cannot be raised for the first time on appeal that the lien had lapsed because the action was not commenced within the statutory period. *Romeo v. Chiagone*, 110 N. Y. Supp. 724, 126 A. D. 402.

Where a judgment has been entered which does not give to a claim the priority over all other claims to which it is entitled, but places it last in the order of payment, and the claimant appeals, perfecting his appeal as to some of the parties, but not as to others, the judgment should be modified, where it can be done without injustice to any of the parties, by giving the claimant priority over those claimants against whom he perfected the appeal. *Hall v. City of New York*, 176 N. Y. 293.

See also *Wolfe v. Horn*, 33 N. Y. Supp. 173, 12 Misc. 100.

In an action by a sub-contractor to foreclose a mechanic's lien if a judgment awarding a personal judgment against the owner is reversed, if facts may be shown upon another trial making him personally liable, a new trial will be awarded instead of dismissing the complaint. *Tradesman's Nat'l Bank v. Boldt*, 139 N. Y. Supp. 531, 155 A. D. 72.

Where the findings are contradictory and the evidence unsatisfactory so that no final judgment can be rendered by the appellate court under § 1317, Code of Civil Procedure, the judgment will be reversed and a new trial granted. *Schreiber v. Stern*, 140 N. Y. Supp. 1094, 156 A. D. 196.

On "Liability of Sureties on Appeal," see § 196.

§ 242. Costs.

STATUTE.

"§ 53. Costs and disbursements.

If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest

in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court."

It has been held that the discretion given the court by this section in the matter of awarding costs, extends to three matters:

- (1). The person to whom the costs should be paid.
- (2). The person by whom the costs shall be paid.
- (3). The amount of costs.

The discretion given is generally equitably exercised, consideration being given to the conduct of the parties to the litigation, the difficulty of the proof and their success. *Salerno v. Vogt*, 138 N. Y. Supp. 664, 78 Misc. 64.

In that case the court reviews some of the authorities as follows:

Harvey v. Brewer, 82 A. D. 589, 81 N. Y. Supp. 846, seems to hold "more or less inferentially that the prevailing party is entitled to costs, and apparently the usual foreclosure costs were awarded. Numerous other cases contain rulings upon the subject of costs, but do not make the point in question as to their amount clear.

It was said in *Ottman v. Schenectady Co-operative Realty Co.*, 119 A. D. 737, 104 N. Y. Supp. 137, that where the owner does not litigate anything, it is inequitable to compel him to pay costs. In *Condon v. Church of St. Augustine*, 112 A. D. 168, 98 N. Y. Supp. 253, it was said that, if it is regarded as equitable, costs may be charged against the plaintiff. In *Valk v. McKiege*, 16 N. Y. Supp. 741, it was held that, where the defendant owner had made general denial and not succeeded, it is proper to allow costs against him.

And in *Holler v. Apa*, 18 N. Y. Supp. 588, it was held that costs may be awarded against an owner in default. And in *Kenney v. Apgar*, 93 N. Y. 539, it was held that such costs may be in excess of the amount due the contractor.

In *Carney v. Reilly*, 18 Misc. 11, 40 N. Y. Supp. 1123, the court said that a plaintiff who recovers is not entitled to any costs as a matter of right. The award is wholly within the discretion of the court to make or withhold. In *Faville v. Hadcock*, 39 Misc. 397, 80 N. Y. Supp. 23, it was held that the provisions of § 3228, subdivision 4, of the Code, do not apply to an action to foreclose a mechanic's lien in which equitable relief is sought."

In *Ottman v. Schenectady Co-operative Realty Co.*, 104 N. Y. Supp. 137, 119 A. D. 736, the owner litigated nothing, but admitted liability and offered to pay the amount due on the contract according to the direction of the court. Therefore the court said it would have been inequitable under the circumstances to charge the owner with costs. And likewise where a defendant lienor takes no active part except to make proof of his lien or to observe some other formality he should not as a general rule be awarded costs.

Where different claimants in a suit fail to sustain their liens or to recover personal judgments, costs may be awarded against all of them, but the owner is entitled to but one bill of costs and not a separate bill against each unsuccessful claimant. *Wolff v. Schaefer*, 93 N. Y. Supp. 184, 103 A. D. 567.

Likewise a separate bill of costs may be awarded to each defendant. *McChesney v. City of Syracuse*, 27 N. Y. Supp. 508, 75 Hun 503.

See also *Atlas Iron Co. v. Ferguson*, 26 N. Y. Supp. 1119, 75 Hun 637, affirmed 148 N. Y. 740; *Faville v. Hadcock*, 39 Misc. 397, 80 N. Y. Supp. 23; *Newman*

Lumber Co. v. Wemple, 56 Misc. 182, 107 N. Y. Supp. 327.

The plaintiff in an action to foreclose a mechanic's lien is entitled to an extra allowance under § 3252 of the Code of Civil Procedure, since by § 43 of the Lien Law the provisions of the Code of Civil Procedure relating to actions for the foreclosure of mortgages upon real property apply to actions in a court of record to enforce mechanic's liens on real property. *McLaughlin v. Mendelson*, 144 N. Y. Supp. 1073, 160 A. D. 37. The case of *Wright v. Reusens*, 15 N. Y. Supp. 504, was decided under a former statute and is not applicable under the present law.

In *Horgan v. McKenzie*, 17 N. Y. Supp. 174, it was held that an extra allowance may be awarded in an action to foreclose a mechanic's lien under § 3253 of the Code of Civil Procedure.

And in the case of *Taylor v. Howard*, 145 N. Y. Supp. 324, it was held that where the plaintiff recovers final judgment with costs, he is entitled to recover, in addition to the costs otherwise prescribed, an additional allowance as provided for in § 3253 of the Code of Civil Procedure.

“ Motion costs and necessary disbursements are all that can be awarded to the successful party in proceedings to obtain surplus moneys arising from the sale of real property under the foreclosure of a mortgage. No allowance to counsel can be made.” *American Mtge. Co. v. Butler*, 36 Misc. 253, 73 N. Y. Supp. 334.

See also *Terry v. Fuller*, 112 N. Y. Supp. 450, 60 Misc. 562.

The report of a referee should award or deny costs, and if costs are awarded it should designate the party to whom the costs to be taxed are awarded. See § 1022, Code of Civil Procedure. If he does not award costs, they are not taxable, since the allowance or dis-

allowance is within his discretion. And the court has no power to allow costs even though the referee's report states that the question of the determination of costs is left to the court. *Stevens v. Weiss*, 25 Misc. 457, 55 N. Y. Supp. 562.

§ 243. Courts not of record.

STATUTE.

“ § 46. Action in a court not of record.

If an action to enforce a mechanic's lien against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner, anywhere within the state, of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished. The form and contents of the summons shall be the same as provided by the code of civil procedure for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve or more than twenty days after the date of the summons, or, if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.”

“ § 47. How summons served, when personal service can not be made.

If personal service of the summons can not be made upon a defendant in an action in a court not of record, by reason of his absence from the state, or his concealment therein, such service may be made by leaving a copy thereof at his last place of residence and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated.”

“ § 48. Proceedings on return of summons; answer; judgment by default.

At the time and place specified in the summons for the return thereof, in a court not of record, issue must be joined, if both parties appear, by the defendant filing with the justice a verified answer, containing a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof; or any other matter constituting a defense to the lien or to the claim upon which it is founded. If the defendant fail to appear on the return day, on proof by affidavit of the service of the summons and complaint, judgment may be rendered for the amount claimed, with costs.”

“ § 49. Issue, how tried; judgment.

If issue is joined in such action in a court not of record, it must be tried in the same manner as other issues in such court, and judgment entered thereon, which shall be enforced, if for the plaintiff, in the manner provided in the following section. If for the defendant, in the same manner as in an action on contract in such court.”

“ § 50. Execution.

Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of the filing of the notice of lien.”

“ § 51. Appeals from judgments in courts not of record.

An appeal may be taken from such judgment rendered in a court not of record, according to the provisions of the code of civil procedure, regulating appeals from judgments in actions on contract in such courts.

“ § 52. Transcripts of judgments in courts not of record.

When a judgment is rendered in a court not of record the justice or judge of the court in which it is tried, or other person authorized to furnish transcripts of judgments therein, shall furnish the successful party a transcript thereof, which he may file with the clerk of the county with whom the notice of lien is filed. The filing of such transcript has the same effect as the filing of a transcript of any other judgment rendered in such courts.”

The summons in an action in a court not of record may be served anywhere within the state, and must be returnable not less than twelve or more than twenty days after date and must be served at least eight days before the return day. The statute does not require the same particularity in the complaint as in cases in a court of record, but only “ substantially the facts contained in the notice of lien and the substance of the agreement under which the labor was performed or the materials were furnished.” Hence it has been held a complaint need not allege that there is a balance due from the owner to the contractor, when a subcontractor is the plaintiff. *Keavey v. DeRago*, 20

Misc. 105, 45 N. Y. Supp. 77. But proof of such balance must be offered.

§ 47 also provides for service of the summons by publication.

It has been questioned whether a court not of record has any jurisdiction to give judgment in a mechanic's lien case, except where the plaintiff is entitled to personal judgment against the defendant, and therefore whether such an action can be maintained by a sub-contractor. The question was raised in the case of *Nelson v. Hajek*, 121 N. Y. Supp. 1018, 67 Misc. 128, on an appeal from a judgment rendered in the municipal court of the City of New York and it was there decided that the court had such jurisdiction, but only because the courts had previously assumed such jurisdiction and thus established a precedent. *Drall v. Gordon*, 101 N. Y. Supp. 171, 51 Misc. 618. One of the arguments against permitting the courts not of record to assume jurisdiction of actions by sub-contractors was, that since all lienors need not be made parties in such courts, separate actions might be brought by each sub-contractor, thus subjecting the owner to a liability in excess of the amount owed on the contract.

The statute itself does not seem to warrant such an assumption of jurisdiction by courts not of record. § 46 provides that the action shall be commenced by the service of the summons "upon the owner." § 48 provides that issue must be joined "if both parties appear," thus implying that there can be but two parties unless there is more than one owner. Likewise, it says "if the defendant fail to appear" only one defendant is named. There is no provision for a determination of the equities between parties, nor for a consolidation of actions where more than one is

brought affecting the same property, hence if sub-contractors may sue, the owner may be subjected to several different judgments the total amount of which exceeds the balance due from him to the contractor.

The distinction between actions in courts of record and in courts not of record is pointed out in the case of *Faville v. Hadcock*, 39 Misc. 397, 80 N. Y. Supp. 23, as follows:

“ The act makes a clear distinction between actions brought in courts of record and those brought in courts not of record. In the former court all the parties in interest including not only those having incumbrances by way of mechanic’s lien, but by judgment, mortgage or otherwise, are required to be made parties. The court must adjust and determine the equities of all the parties, and also the order of priority of the different liens. In short, the form of action, the enforcement of the judgment by foreclosing the rights of the parties, the awarding of a deficiency judgment against persons liable for the debt and all proceedings are in all respects the same as in the foreclosure of a mortgage in courts of equity. But in courts not of record, no such proceedings are had. The action proceeds as a personal one upon the agreement set forth in the notice of lien. There is no provision for the adjustment of equities among other lienors and incumbrances, if any should exist, and the judgment is enforced by execution in the same manner and subject to the same limitations and restrictions as judgments in actions at law, except that the sale is of the interest of the owner at the time of the filing of the lien and not from the entry of the judgment. Strictly speaking it is an action at law and in so sense an action in equity. The remedy afforded to a lienor falls far short of that available to him in an action in a court of record.”

And in *Drall v. Gordon*, 101 N. Y. Supp. 171, 51 Misc. 618, the court says:

“The power given is limited to the rendering of a simple money judgment against the defendant to be enforced by an execution authorizing a sheriff to sell the right, title and interest which the judgment debtor had in the property at the time the lien was filed. (Citing *Katzen v. Nathanson*, 33 Misc. 299, 68 N. Y. Supp. 497; *Eadie v. Waldron*, 64 A. D. 424, 72 N. Y. Supp. 233.) No other lienor but the plaintiff need be made a party and the court cannot adjust the priority of liens, nor permit a defendant lienor to establish his lien in such an action. That must be done in an action brought by such lienor in person. . . . The court had no right to order a sale of the property.”

See also *Pearce v. Knapp*, 127 N. Y. Supp. 1100, 71 Misc. 324; *Eadie v. Waldron*, 64 A. D. 424, 72 N. Y. Supp. 233; *Schummer v. Kohn*, 111 N. Y. Supp. 728; *Eagen v. Laemle*, 25 N. Y. Supp. 330, 5 Misc. 224.

The municipal court may permit an amendment to the complaint at the trial, adding a prayer for personal judgment to one for the foreclosure of a lien. Such an amendment does not amount to the substitution of one cause of action for another. *Zide v. Scheinberg*, 114 N. Y. Supp. 41.

The costs allowed in a court not of record are “the same as allowed in civil actions in such courts,” and are not discretionary as in a court of record. See § 54, Statute. *Salerno v. Vogt*, 138 N. Y. Supp. 664, 78 Misc. 64.

A notice of pendency of action must be filed as in actions in a court of record. See §§ 17 and 18 of Statute.

A court not of record has no power to make an order for the discharge of a lien, see § 191 and § 211.

It has been held that even where an action is

brought for the foreclosure of a lien in a Municipal Court and judgment rendered in favor of the defendant dismissing the complaint upon the merits that the lien is not discharged of record by reason of the Municipal Court judgment and also that the Supreme Court has no jurisdiction to direct a discharge of the lien. The case is unreported, but appears in the New York Law Journal for January 21, 1914, and was decided by the Special Term in Kings county, and the opinion is hereafter given in full.

In the *Matter of Ruderman*, N. Y. Law Journal, January 21, 1914, Supreme Court, Special Term, Kings county.

“ This is an action to cancel and discharge a mechanic’s lien filed July 11, 1913. An action was subsequently instituted in the Municipal Court to enforce the lien, and on December 9, 1913, judgment was rendered therein in favor of the defendants (the petitioners in this proceeding) dismissing the complaint upon the merits. The lien, however, remains undischarged of record. I have not been able to find any provision in the Lien Law authorizing the Supreme Court to direct the cancellation of a lien under the circumstances above stated. The cases in which a mechanic’s lien may be discharged of record are prescribed by sections 19, 20, 55 and 59 of the Lien Law. These sections provide for the discharge of a lien by filing a satisfaction, in case of a failure to commence an action within one year, or have the lien extended by filing a bond, by deposit of money with the county clerk, by payment of money into court after action brought and by giving a thirty days’ notice to commence an action. None of these provisions includes, therefore, the case presented by the facts above recited, and it is my opinion that the Supreme Court has no inherent jurisdiction to direct the county clerk

to discharge a lien, for in filing the lien he is not acting in his capacity as clerk of the court (see *Matter of Conrad*, 155 A. D. 590; *In re Bloom*, 142 N. Y. Supp. 447). It is provided by section 52 of the Lien Law that the filing of a transcript of a judgment from a court not of record in the office of the county clerk shall have the same effect as the filing of a transcript of any other judgment rendered in such court. Section 261 of the Municipal Court Act provides as follows: 'The clerk of the court in the district in which a judgment is rendered must, upon the application of the party in whose favor the judgment was rendered, deliver to him a transcript of the judgment, except as provided in the last section. In an action brought to foreclose a mechanic's lien, if judgment be rendered in favor of plaintiff, said clerk shall insert in said transcript, in addition to the matters required to be inserted in other transcripts, a statement that the action was brought to foreclose a mechanic's lien and that said lien has been duly established and adjudged against the interest of the defendant in the property described in the complaint at the time of the filing of the notice of lien. The county clerk of the county in which the judgment was rendered must, upon the presentation of the transcript and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office and docket the judgment as of the time of the receipt of the transcript, in a book kept by him for that purpose, as prescribed by law, and if the judgment be one which is rendered for the recovery of a chattel which has been delivered to the unsuccessful party, or for the value thereof, or for the foreclosure of a mechanic's lien, must also enter in the docket the particulars of the judgment as stated in the transcript. Thenceforth the judgment is deemed a judgment of the Supreme Court and may

be enforced accordingly. But nothing in this section shall be construed to prevent the Municipal Court from vacating, setting aside or modifying the judgment as hereinbefore provided.' Under these sections it may be that the filing of a transcript of the judgment in the county clerk's office would be sufficient to relieve the premises of the incumbrance of the lien, although no express provision is made in section 261 of the Municipal Court Act for a case where the judgment in an action to enforce a lien is in favor of the defendant. If we assume that a transcript of a judgment dismissing the complaint on the merits in such a case may be issued by the clerk of the Municipal Court, and filed and docketed by the county clerk, then the judgment would, upon such filing, become a judgment of the Supreme Court, and the effect thereof on the lien would be the same as if the judgment had been rendered in the Supreme Court. If this procedure is not available to relieve the premises of the lien, it can only be said that there is a defect in the law which only the legislature has power to remedy."

CHAPTER FIFTEEN.

ASSIGNMENTS OF LIENS AND CONTRACTS.

§ 244. Statutes.

LIEN LAW.

“ § 14. Assignment of lien.

A lien, filed as prescribed in this article, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Such assignment shall contain the names and places of residence of the assignor and assignee, the amount of the lien and the date of filing the notice of lien, and be filed in the office where the notice of the lien assigned is filed. The facts relating to such an assignment and the names of the assignee shall be entered by the proper officer in the book where the notice of lien is entered and opposite the entry thereof. Unless such assignment is filed, the assignee need not be made a defendant in an action to foreclose a mortgage, lien or other incumbrance. A payment made by the owner of the real property subject to the lien assigned, or by his agent or contractor, or by the contractor of a municipal corporation, to the original lienor, on account of such lien, without notice of such assignment and before the same is filed, shall be valid and of full force and effect. Except as prescribed herein, the validity of an assignment of a lien shall not be affected by a failure to file the same.”

“ § 15. Assignments of contracts and orders to be filed.

No assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property or of the money or any part thereof due or to become due therefor, nor an order drawn by a contractor or sub-contractor upon the owner of such real property for the payment of such money shall be valid, until the contract or a statement containing the substance thereof, and such assignment or a copy of each or a copy of such order, be filed in the office of the county clerk of the county wherein the real property improved or to be improved is situated, and in case of a contract with a municipal corporation, also with the comptroller or chief fiscal officer thereof, and such contract, assignment or order shall have effect and be enforceable from the time of such filing. Such clerk shall enter the facts relating to such assignment or order in the ‘lien docket’ or in another book provided by him for such purpose.”

" § 16. Assignment of contracts and orders for public improvement to be filed.

No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the municipal corporation, or the head of the department or bureau having charge of the construction of such public improvement, or the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid until such assignment or order, or a copy thereof, be filed with the head of the department or bureau having charge of such construction, and with the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be enforceable from the time of such filing. The financial officer of the municipal corporation, or other officer or person with whom the assignment or order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose."

GENERAL MUNICIPAL LAW.

" § 86. Contractors not to assign contracts with municipality without its consent.

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any municipal corporation, or any public department or official thereof, prohibiting any contractor, to whom any contract shall be let, granted or awarded, as required by law, from assigning, transferring, conveying, subletting or otherwise disposing of the same, or of his right, title or interest therein, or his power to execute such contract, to any other person, company or corporation, without the previous consent in writing of the department or official awarding the same.

If any contractor, to whom any contract is hereafter let, granted or awarded, as required by law, by any municipal corporation in the state, or by any public department or official thereof, shall, without the previous written consent specified in the first paragraph of this section, assign, transfer, convey, sublet or otherwise dispose of the same, or his right, title or interest therein, or his power to execute such contract, to any other person, company or other corporation, the municipal corporation, public department, or official, as the case may be, which let, made, granted or awarded said contract shall revoke and annul such contract, and the municipal corporation, public department or officer, as the case may be, shall be relieved and discharged from any and all

liability and obligations growing out of said contract to such contractor, and to the person, company or corporation, to whom he shall assign, transfer, convey, sublet or otherwise dispose of the same, and said contractor, and his assignee, transferee, or sublessee, shall forfeit and lose all moneys, theretofore earned under said contract except so much as may be required to pay his employees; provided, that nothing herein contained shall be construed to hinder, prevent or affect an assignment by such contractor for the benefit of his creditors, made pursuant to the statutes of this state."

§ 245. Assignment of lien.

A mechanic's lien which has been filed is a chose in action and may be assigned as prescribed in § 14; *First National Bank v. Mitchell*, 93 N. Y. Supp. 231, 46 Misc. 30. But the right to acquire the lien is given to the laborer or material man for his personal protection, and the right to create it cannot be assigned, unless the assignment is made for the benefit of the assignor to be held as his agent. *Rollin v. Cross*, 45 N. Y. 766; *Chambers v. Vassar's Sons*, 143 N. Y. Supp. 615, 81 Misc. 562.

The right to acquire the lien is purely statutory, and the assignee not having performed the labor or furnished the material is not within the terms of the statute allowing the lien. The protection intended to be given is for the security of the mechanic or material man whose labor and materials have gone into the building, and not for strangers who have merely purchased a debt.

But where one partner of a firm of contractors purchases the interest of the others, he may acquire a lien for labor or materials furnished by the firm. He as a member of the firm has personally encountered the risk involved in giving credit to the owner. *Ogden v. Alexander*, 140 N. Y. 356; *Tisdale Lumber Co. v. Read Realty Co.*, 154 A. D. 270, 138 N. Y. Supp. 829.

And where the contract is assigned and the assignee

does the work, he is entitled to file a lien. *Schalk v. Norris*, 27 N. Y. Supp. 390, 7 Misc. 20.

§ 246. Assignments of contracts and orders.

Under the older statutes assignments of contracts or of moneys due thereunder were not required to be filed, and were valid as against subsequent liens in the case of private contracts, and could defeat the claims of laborers and material men in the case of municipal contracts, since no liens could be filed against the latter.

To protect laborers, material men and sub-contractors against such assignments, local ordinances were enacted in New York City which provided that contracts to which the city was a party must contain a provision that the contractor should furnish satisfactory evidence to the commissioner of public works, or other supervising official, that all parties who had performed labor or furnished material under the contract and who had so notified the city had been paid. In case such evidence was not furnished, sufficient moneys were to be retained by the city to pay any claims made under notices so filed. Under these provisions the sub-contractors on city work were protected against fraudulent assignments as they could have been in no other way, since the Lien Law at that time gave them no liens.

Under this local ordinance, actions arose in which it was apparently decided that assignments could not be held valid against sub-contractors, material men or laborers who later made claims against the contract. *Merchants & Traders' Bank v. Mayor*, 97 N. Y. 355; *Mechanics & Traders' Bank v. Winant*, 123 N. Y. 265.

These cases read without keeping in mind the stat-

utes as they then were, have tended to some confusion in the interpretation of later statutes. By the amendment of the Lien Law giving protection to sub-contractors by the right of lien, the necessity of such additional protection by the city has been dispensed with. And a clause in a contract requiring proof by the contractor that no liens exist against the premises before payment may be compelled, is now construed to be for the benefit of the owner only and not for subsequent lienors. Such clauses give no additional right to a third party, and compliance therewith may be waived by the owner. *Bates v. Salt Spring National Bank*, 157 N. Y. 328; *Brewster v. City of Hornellsville*, 54 N. Y. Supp. 904, 35 A. D. 626; *Hackett v. Campbell*, 42 N. Y. Supp. 47, affirmed 159 N. Y. 537; *McKay v. City of New York*, 46 A. D. 579, 62 N. Y. Supp. 58.

The terms of a contract have force only over those who are parties to it. *Lowry v. Inman*, 46 N. Y. 129.

Since under the present statute sub-contractors and others having claims against a contractor can by proper diligence protect their interests in both municipal and private contract work, there is no reason why a contractor should not have the privilege of assigning his contract or the proceeds thereof for any legitimate purpose, such as securing financial aid in its execution. Such assignments often secure to the contractor the very means of completing the contract, to the benefit of both the owner and sub-contractors, and are not to be condemned if made in good faith. *McKay v. City of New York*, 62 N. Y. Supp. 58, 46 A. D. 579; *Williams v. State*, 88 N. Y. Supp. 19, 94 A. D. 489; *Riverside Const. Co. v. City of New York*, N. Y. Law Journal, December 23, 1913.

The protection of material men, laborers and sub-contractors requires, however, that they may be enabled to know fully the circumstances of their employ-

ment, and, therefore, under §§ 15 and 16 of the Statute, it is required that equitable assignments to be effective against subsequent liens must be filed, in the county clerk's office in the case of private contracts, and in the case of public contracts, in the office of the financial officer of the municipality or state and with the head of the department in charge of the work.

There is an apparent inconsistency between § 15 and § 16. Under § 15 the assignment of a municipal contract or the moneys due or to grow due thereon must be filed in the office of the clerk of the county as well as with the chief fiscal officer of the municipal corporation; whereas under § 16 it is sufficient if the assignment be filed with the head of the department or bureau having charge of the work and with the financial officer charged with the custody and disbursement of the corporate funds applicable to the contract.

“ It is evident that upon the subject of filing assignments of contracts for municipal improvements or of the money to grow due thereon the sections above quoted are inconsistent and repugnant. § 16 completely covers the whole subject of assignments of municipal contracts and the money to grow due thereon. Reading these two sections together in the light of their history, it must be held under well-settled rules of statutory construction that the latter section (16) *protanto* repeals, the provisions of the earlier section (15) so far as it relates to municipal contracts, (*Hockmann v. Pinkney*, 81 N. Y. 211) and furnishes the only rule as to the necessity of filing assignments of contracts for public improvements and of the money to grow due thereon.” *Contractors' Supply Co. v. City of New York*, 153 A. D. 60, 138 N. Y. Supp. 242.

See also *Willard Co. v. City of New York*, 142 N. Y. Supp. 11, 81 Misc. 48.

The latter case also holds that where an assignment of a public improvement contractor's right to payments under his contract to a bank furnishing money with which to perform the contract is absolute in form, its scope is not limited by the surety on the bond given by the contractor for the faithful performance of the work, imposing as a condition to its consent, that a certain percentage of the money shall be retained until the completion of the work. Such a provision is solely for the benefit of the surety and will not inure to the benefit of lienors who are strangers to it. Hence, such lienors cannot avail themselves of such limitation.

See also *Van Kannell Revolving Door Co. v. Astor*, 104 N. Y. Supp. 653, 119 A. D. 214; *Tulkow v. Metropolitan Life Ins. Co.*, 73 Misc. 393; *Harvey v. Brewer*, 178 N. Y. 5; *Kenyon v. Walsh*, 31 Misc. 634, 66 N. Y. Supp. 35; *Riley v. Kenny*, 67 N. Y. Supp. 584, 33 Misc. 384; *Nason Mfg. Co. v. Adams*, 134 N. Y. Supp. 1100, 76 Misc. 590; *Rockland Lake Co. v. Village of Port Chester*, 92 N. Y. Supp. 632; *Concord Const. Co. v. Plante*, 116 N. Y. Supp. 153, 63 Misc. 120, 121 N. Y. Supp. 1026, 137 A. D. 243; *Goodrich v. Board of Education*, 137 A. D. 499, 122 N. Y. Supp. 50; *Wood v. Grifenhagen*, 75 N. Y. Supp. 1014, 37 Misc. 553.

An order, given by a contractor to a material man, upon the maker of a loan secured by the lands and building, which order was accepted, is not within § 15 of the statute and the acceptor is not relieved from liability thereunder by the filing of a lien prior to the filing of the order. The order is not drawn by or upon a contractor or sub-contractor, or by any person holding such relation to the property, and, therefore, the acceptor of the order cannot escape lia-

bility by reason of the fact that a lien has been filed upon the property. *Rosenblum v. Tilden Imp. Co.*, 136 A. D. 743, 121 N. Y. Supp. 510.

The contract need not be filed when an order is given on moneys due under it. When an assignment is given the contract must be filed. *Brace v. Gloversville*, 167 N. Y. 452; *Barrett v. Schaefer*, 146 N. Y. Supp. 1056. The assignment must be drawn upon a definite fund which must be clearly indicated. *McDonald v. Ballston Spa*, 70 N. Y. Supp. 279, 34 Misc. 496.

But the only effect of § 15 and § 16 is to require the filing of the evidence of the assignment where the payments are to be made in the future. It does not require the filing of the assignment where the payment is made at once and in good faith, for as to such payments the owner is protected against subsequent lienors. See "Advance Payments," § 177. *Lawrence v. Dawson*, 50 A. D. 570, 64 N. Y. Supp. 185; *Harvey v. Brewer*, 178 N. Y. 5; *Van Kannell Revolving Door Co. v. Astor*, 119 A. D. 214, 104 N. Y. Supp. 653.

A general denial is sufficient to raise the issue of the failure to file the assignment. *Nason Mfg. Co. v. Adams*, 134 N. Y. Supp. 1101, 76 Misc. 590.

§ 247. Provisions against assignments.

Where the contract is assigned, sublet or otherwise disposed of in its entirety, in cases of municipal contracts, so that its execution is taken out of the control of the contractor, written consent to such assignment must first be had from the department or official awarding the same. § 86, General Municipal Law. There is a difference between assigning moneys due under a contract and assigning the contract itself. The latter form of assignment disturbs the personal relationship existing between the contracting parties,

and is prohibited. *Snyder v. City of New York*, 77 N. Y. Supp. 637, 74 A. D. 421.

A provision in a contract prohibiting the assignment of the same by the contractor without permission of the owner, does not prohibit an assignment of moneys due thereunder, or a claim for the breach thereof, whether the contract be public or private; such clauses are for the benefit of the owner only; they may be waived by the owner, and they do not inure to the benefit of a junior assignee who seeks to advance his assignment over that of a prior assignee without consent of the owner. *Fortunato v. Patten*, 147 N. Y. 277; *Hurd v. Johnson Park Imp. Co.*, 13 Misc. 643, 34 N. Y. Supp. 915; *Brewster v. City of Hornellsville*, 54 N. Y. Supp. 909, 35 A. D. 626.

But a failure on the part of the contractor to procure permission prior to an assignment of a contract with a city, does not make the contract void, but voidable only, upon appropriate action being taken for that purpose, by the city. *People ex rel. Rodgers v. Coler*, 67 N. Y. Supp. 701, 56 A. D. 98, affirmed 166 N. Y. 1.

§ 248. Liability of assignee.

The contract of assignment deals only with the future, and hence there can be no liability by the assignee for previous torts of the assignor. *Lockwood v. Naughton Co.*, 93 N. Y. Supp. 614, 47 Misc. 114.

A party who takes an assignment of a claim or cause of action, takes it subject to all equities or defenses existing between the original parties at the time of the assignment, but it does not follow that he takes it subject to any equity that may subsequently arise between them upon new and independent contracts, though they relate to the same subject matter. *Lawrence v. Congregational Church*, 164 N. Y. 115.

§ 249. Assignments and sureties.

When a contractor assigns moneys due or to grow due under a contract, and abandons the work before completion, and the surety completes the work, the assignment is valid only against the amount due up to the time of the abandonment, and no claim can be made against the surety for the balance. The surety takes the contractor's place and completes the contract, but in doing so it does not represent the contractor, but itself as a party to the contract, and it is not obliged to account to the contractor. *Harley v. Mapes-Reeve Const. Co.*, 68 N. Y. Supp. 191, 33 Misc. 626.

§ 250. General assignments.

A general assignee for the benefit of creditors takes subject to the right of those entitled to file liens to perfect the same within the statutory period. *Kane v. Kinney*, 174 N. Y. 69; *Armstrong v. Chisholm*, 99 A. D. 465, 91 N. Y. Supp. 299. See "Priorities," §§ 179 to 183.

§ 251. Fraudulent assignments.

An assignment of a sum due from a firm of building contractors made by one of the partners in the firm name, in satisfaction of his individual obligation incurred prior to the formation of the partnership, is without consideration and void as against a mechanic's lien filed by a sub-contractor, subsequent to the assignment. The lien of such contractor on the sum assigned is superior to the claim of a trustee appointed on the bankruptcy of the partners, whether or not such assignment be void or voidable under the Bankruptcy Act. And an assignment of a portion of a sum due to a firm of contractors to a person who had previously guaranteed the payment of an accom-

modation note made by another person for the benefit of the firm, which assignment was made after the guaranty on which there was no right to indemnity, and before the maturity of the note, is without consideration and void as against sub-contractors who filed liens on the sum assigned. This is true although the guarantor paid the note when it subsequently fell due, if the maker was able to pay to the knowledge of the guarantor. Where such an assignment is made and accepted with the intent to defraud the lienors, it is void as to them, even though the voluntary payment of the note by the guarantor should be deemed to be a consideration. *Concord Const. Co. v. Plante*, 137 A. D. 243, 121 N. Y. Supp. 1026, 116 N. Y. Supp. 153, 63 Misc. 120; see Moore on Fraudulent Conveyances.

§ 252. Orders for payment.

A writing delivered to a third person by a contractor, and addressed to an owner, requesting him to pay a certain sum and charge the same to the contractor's account, is not an assignment, but an order which must be accepted to be binding upon the drawee. *Hurd v. Johnson Park Imp. Co.*, 13 Misc. 643, 34 N. Y. Supp. 915.

See also *Williams v. Edison Electric Co.*, 16 N. Y. Supp. 857.

But acceptance by the owner does not constitute an unconditional promise to pay. The presentation of such an order would constitute an assignment *pro tanto* of the funds in the owner's hands. *Lauer v. Dunn*, 115 N. Y. 405; *McCorkle v. Hermann*, 117 N. Y. 297; *Stevens v. Ogden*, 130 N. Y. 182; *Beardsley v. Cook*, 143 N. Y. 143; *Brill v. Tuttle*, 81 N. Y. 454; *Crouch v. Miller*, 141 N. Y. 497; *Murray v. Micolino*, 31 N. Y. Supp. 1109, 10 Misc. 725.

If the order was properly filed, as required by §§ 15 and 16 of the statute, it would take precedence over liens filed subsequently. But the owner is bound only to the contractor. Thus, if an order is given requesting the owner to pay a certain amount from the last payment to become due to the contractor, and the owner accepts the order, but the contractor subsequently abandons the contract so that nothing becomes due, the owner is not liable. *Mesereau v. Villari*, 74 Hun 59, 26 N. Y. Supp. 135; *Lawrence v. Phipps*, 22 N. Y. Supp. 16, 67 Hun 61; *Home Bank v. Drumgoole*, 109 N. Y. 63; *Miller v. Norcross*, 87 N. Y. Supp. 56, 92 A. D. 352; *Jenks v. Brown*, 66 N. Y. 629.

The order may, however, be valid as such even though it is given before anything is due the contractor. An assignment may be of moneys due and to become due. *Bradley Currier Co. v. Ward*, 15 A. D. 386, 44 N. Y. Supp. 164, affirmed 162 N. Y. 618. And if a complete performance of the contract is made impossible by the owner, so that nothing becomes due upon the order, the owner may nevertheless be held liable thereon. *Robinson v. Gray*, 39 N. Y. Supp. 1066, 17 Misc. 341.

Where the contractor defaults so that nothing becomes due upon the order, if the payee offers to complete the work for the purpose of validating the order, if the owner prohibits him from so doing, the owner may be held liable upon the order, and cannot defend on the ground of the contractor's non-performance. *Myers v. Gallon*, 35 A. D. 449, 54 N. Y. Supp. 830, affirmed 164 N. Y. 593.

Notice to the owner of the assignment or order is necessary. *Crouch v. Miller*, 141 N. Y. 497; *Curtis Bros. Lumber Co. v. McLoughlin*, 80 A. D. 636, 80 N. Y. Supp. 1016.

FORMS.

FORM 1.

DEMAND FOR TERMS OF CONTRACT FOR IMPROVEMENT OF REAL PROPERTY.¹

To:, Owner of (description of property).

In accordance with the provisions of § 8 of Article 2 of the Lien Law, I hereby notify you that I have entered (or am about to enter) into a contract with (contractor), (or sub-contractor of, contractor) to perform certain services for him, (or furnish certain materials to him) in connection with the contract of said contractor with you for the improvement of said property, and I hereby demand of you a statement of the terms of your said contract with said (contractor) pursuant to which the improvement of the above described real property is being made, and also a statement of the amounts due or to become due thereon by you to said contractor, and the dates when the same will become due.

Yours, etc.,

.....,

(Address.)

¹ See § 172 of text.

FORM 2.**NOTICE OF MECHANIC'S LIEN ON REAL PROPERTY.**

By Laborer or Material Man.

To: Hon., Clerk of the County of
.....

You are hereby notified that, the
lienor herein,² residing at, City of;
has and claims a mechanic's lien upon real property,
as follows:

I. The name of the owner³ of the real property
against whose interest therein the lien is claimed is
.....; and the interest of the owner in
such property is as follows:

II. A. (If the lien is for labor.) The name of the
person by whom the lienor was employed is:
.....

B. (If the lienor is a material man.) The name of
the person to whom the lienor furnished materials is:
.....

(If the lien is for material to be delivered, no
delivery having been made at the time of the notice.)
The name of the person to whom the lienor is to fur-
nish materials is:

(If part of the material has been delivered and
further deliveries are to be made.) The name of the
person to whom the lienor has furnished and is to
furnish materials is:

III. A. (By laborer. (1). The labor performed

² In the case of a partnership state the names of all partners, the residence of each and the business address of the firm. In the case of a corporation state the place of its principal office. See § 9 of statute and § 162 of text.

³ There may be more than one owner whose interest is chargeable. See definition of term owner and §§ 133 and 163 of text.

was; (or 2). The labor to be performed is; (or if labor has been performed and further services are to be rendered, use both (1) and (2) distinguishing the services already performed from those to be performed.)⁴

B. (By material man.) (1). The material furnished was (or 2). The material to be furnished is (or if the material has been partly delivered and further deliveries are to be made, use both (1) and (2), distinguishing the material delivered from that to be delivered.)

IV. The agreed price of said labor performed (or materials furnished) is Dollars ° [or the reasonable value of said labor performed (or materials furnished) is Dollars]. The agreed price of said labor to be performed is Dollars, etc., as in paragraph III.

V. The amount unpaid to the said, the lienor, for such labor (or materials) is Dollars.⁵

VI. The time when the first item of work was performed (or the first item of material was furnished) was the day of, 19..; the time when the last item of labor was performed (or the last item of material was furnished) was the day of, 19..⁷

VII. The property to be charged with the lien is situated in the Borough of, City of
....., County of (Give a description sufficient for identification; and if the property is

⁴ See § 164 of text.

⁵ Statement as to the consideration agreed to be paid must not be made in the alternative but must state either the agreed price or the reasonable value, not both.

⁶ See § 164 of text.

⁷ See § 165 of text.

situated in a city or village give its location by street and number; a diagram may also be annexed.)⁸

.....,
(Signature.)⁹

State of New York, }
County of } ss.:

....., being duly sworn, says that he is the lienor mentioned in the foregoing notice of lien, that he has read the said notice and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.¹⁰

Sworn to before me this }
..... day of, 19.. }

FORM 3.

NOTICE OF MECHANIC'S LIEN ON REAL PROPERTY.

By Contractor.

To: Hon., Clerk of the County of
.....

You are hereby notified that, the lienor¹¹ herein, residing at, City of

⁸ See § 166 of text.

⁹ The statute does not require that the notice be signed. See § 167.

¹⁰ Verification. See § 167 of text. If the lienor is a partnership, or corporation, appropriate verification must be added.

¹¹ In the case of a partnership state the names of all partners, and the residence of each. See § 162.

In the case of a corporation state the place of its principal office.

.....; has and claims a mechanic's lien upon real property, as follows:

I. The name of the owner of the real property against whose interest therein the lien is claimed is; and the interest of the owner in such property is as follows:¹²

II. That the name of the person with whom the above named lienor has contracted for the improvement of said real property is, the owner of said property. (If the interest of an owner other than the owner with whom the contract was made is to be charged, state that the improvements were made with the consent of the former.)

III. That by said contract between said and the said the lienor agreed to (state briefly the terms of the contract, showing the material to be furnished and labor to be performed).

That all of the services thereby required to be performed by have been performed, and all of the materials thereby required to be furnished by said have been furnished, and the agreed price which said agreed to pay for said services and materials is Dollars. (If the contract has not been fully performed, so state and show what materials have been furnished; what services have been rendered; what materials are still to be furnished; and what services are still to be performed. Also state the contract price.)

IV. That the amount unpaid to the lienor on account of the agreed price of said labor and materials is \$.....

¹² There may be more than one owner chargeable. See definition of term "owner," § 133 and § 163.

V. That the time when the first item of work was performed under said contract was the day of, 19..; the time when the first item of materials was furnished under said contract was the day of, 19.. That the time when the last item of work was performed under said contract was the day of, 19., and the time when the last item of work was performed under said contract was the day of, 19..

VI. That the real property to be charged with the lien is situated in the Borough of, City of, County of (Give description sufficient for identification and if the property is situated in a city or village give its location by street and number; a diagram may be annexed.)

Dated,

.....,
(Signature.)

(Verification.)¹³

FORM 4.

NOTICE OF LIEN ON A PUBLIC IMPROVEMENT.¹⁴

To: Hon., Comptroller of the City
of, and Hon., Head
of Department of of the City of

PLEASE TAKE NOTICE that,
who resides at, in the City of
has and claims a lien upon the monies of the City of
which remain in the hands of the comp-

¹³ See § 167 of text.

¹⁴ See § 12 of statute and §§ 204-209 of text.

troller which are applicable to the construction of the public improvement hereinafter described, to the extent of the amount due or to become due on a contract made by the City of acting by and through, (head of the department in charge of the work) with, (contractor) for the construction of such improvement. Such lien is based upon the following facts:

I. The name of the contractor (or sub-contractor) for whom the labor hereinafter specified was performed and the materials were furnished is¹⁵

II. The amount now due and unpaid for such labor and materials is \$....., which became due on or about the day of, 19.. (If the full amount earned is not yet due, so state and give the date when the balance will become due.)

III. The public improvement for the construction of which this lien is claimed and upon which the labor hereinafter specified was performed and the materials furnished is as follows: (Describe contract between contractor and city.)

IV. The labor and materials for the performance and furnishing of which this lien is claimed are as follows: (Describe labor and materials performed and furnished by lienor including extra work if any.)

V. The labor and materials above specified were actually performed and furnished for the above named contractor and have been actually used in the execution and completion of the contract for the construction of such public improvement in pursuance of a contract made and executed between the said
....., the lienor herein, and the said, contractor, (or sub-contractor) dated the day

¹⁵ There can be no lien upon a public improvement for labor to be performed or materials to be furnished.

of, 19.., whereby the said,
 lienor, agreed to provide all material and perform all
 the work, etc. (Describe contract between lienor and
 contractor (or sub-contractor) stating terms thereof.)

Dated,, 19..

.....,
 (Signature.)

(Verification as in Form 2.)

FORM 5.

ASSIGNMENT OF MECHANIC'S LIEN ON REAL PROPERTY.

KNOW ALL MEN BY THESE PRESENTS, that
,¹⁶ residing at, City of
, for value received, has sold and by these
 presents does grant, assign and convey unto
, residing at, in the City of,
 his executors, administrators or assigns, all of the
 right, title and interest of said, in
 and to a certain mechanic's lien in the amount of
 Dollars, notice of which has been hereto-
 fore filed by said, in the office of the
 Clerk of the County of, on the day
 of, 19.., at o'clock, .. M., against
 the interest of as owner, in the fol-
 lowing described property:

(Description.)

And the said (assignor), does hereby constitute and
 appoint the said (assignee), his executors, adminis-

¹⁶ If either party is a partnership the names and residence of each partner must be stated, and if a corporation the place of its principal office.

See §§ 244 to 246 of text, as to place of filing.

trators and assigns, his true and lawful attorney, irrevocable in his name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive all such sum and sums of money which now are, or may hereafter become due, owing and payable for or on account of all or any of the accounts, dues, debts and demands above assigned, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever necessary as fully to all intents and purposes as said (assignor) might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or his substitute shall lawfully do, or cause to be done by virtue hereof.

IN WITNESS WHEREOF the said
has hereunto set his hand and seal this day of
....., 19..

..... (Seal.)

(Acknowledgment.)

FORM 6.

ASSIGNMENT OF MECHANIC'S LIEN ON A PUBLIC IMPROVEMENT.¹⁷

KNOW ALL MEN BY THESE PRESENTS, that
....., residing at in the City
of, for value received has sold and by these
presents does grant, assign and convey unto
....., residing at in the City of,
his executors, administrators or assigns, all of the

¹⁷ See §§ 244 to 246 of text as to place of filing.

right, title and interest of said, in and to a certain mechanic's lien in the amount of Dollars, notice of which has been heretofore filed by said with the comptroller of the City of, on the day of, 19.., at .. o'clock, .. M., and with the head of the department of of said city, on the day of, 19..; said lien being upon moneys due and to become due from said City of to as contractor under a certain contract between him and said City of, dated the day of, 19.., for, etc. (Describe contract.)

(Continue as in form 5 for the Assignment of a Mechanic's Lien upon Real Property, including Acknowledgment.)

FORM 7.

ASSIGNMENT OF MONEYS DUE OR TO BECOME DUE UNDER CONTRACT.¹⁸

KNOW ALL MEN BY THESE PRESENTS, that, residing at, in consideration of (state consideration in full) and other good and valuable considerations receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and by these presents does sell, assign, transfer and set over unto, of,

¹⁸ See §§ 15 and 16 of statute and §§ 244-247 of text, as to filing of assignments. Where the entire contract for a public improvement is assigned, the consent of the municipality to the assignment is necessary, and the consent of the surety will usually be insisted upon.

A copy of the contract need not be filed except where the entire contract is assigned. § 247.

his executors, administrators and assigns, to their own use and benefit, any and all sums of money to the extent of Dollars, now due or to grow due to said upon a certain contract between said and, dated the day of, 19.., for the (describe contract) to have and to hold the same unto the said, his executors, administrators and assigns for their own and proper use forever. And the said does hereby make, constitute and appoint the said, his true and lawful attorney, irrevocable in his name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive said sum of Dollars which is hereby assigned, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever necessary as fully to all intents and purposes as said might or could do if personally present, with full power of substitution and revocation, hereby ratifying all that the said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF the said has hereunto set his hand and seal this day of, 19..

..... (Seal.)

(Acknowledgment.)

FORM 8.**AFFIDAVIT FOR ORDER CONTINUING LIEN UPON REAL PROPERTY.¹⁹**

..... Court — County.

In the Matter of the Applica-
tion of

.....
for an Order Continuing a
Mechanic's Lien upon Real
Property.

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that on the day of, 19.., at o'clock, .. M., pursuant to the provisions of the Lien Law, he caused to be filed in the office of the Clerk of the County of, a notice of mechanic's lien upon real property, a copy of which is annexed hereto and made part of this affidavit. That said notice was filed within 90 days after the performance of the last item of services (or the delivery of the last item of materials furnished) as stated therein, (or both).

That no action has been commenced for the foreclosure of said lien, because (state reasons).

That the time within which your deponent may institute action for the foreclosure of said lien will expire on the day of, 19.. That this

¹⁹ This order is granted *ex parte*, and by courts of record only. See §§ 187 and 190, of text; § 17 of statute.

affidavit is made in support of a motion for an order continuing said lien, for a period of one year from the date of said order, to wit, until the day of, 19..

(State whether any previous application has been made, and if so the circumstances which justify a renewal of the motion and annex copy of notice of lien).

Sworn to before me this }
..... day of, 19.. }

.....

FORM 9.

ORDER CONTINUING LIEN.

At a Special Term of the Court,
held in and for the County of,
at the County Court House, at,
on the day of, 19..

Present — Hon., Justice.

<p>In the Matter of the Applica- tion of</p> <p>.....</p> <p>for an Order Continuing a Mechanic's Lien upon Real Property.</p>
--

Upon the annexed affidavit of,
verified the day of, 19.., and upon
the motion of, his attorney, it is

ORDERED, That the mechanic's lien claimed by , in pursuance of his notice of lien heretofore filed in the office of the Clerk of the County of , on the day of , 19.., at o'clock, .. M., against the interest of as owner in the real property described in said notice, to wit: (Description) be and the same hereby is continued until the day of , 19.. And the Clerk of the County of is hereby directed to redocket said lien accordingly as of the date of the making and entry of this order.

Enter:

.....,
Justice.

FORM 10.**AFFIDAVIT FOR ORDER TO CONTINUE MECHANIC'S LIEN
UPON A PUBLIC IMPROVEMENT.²⁰**

Supreme Court — County.

In the Matter of the Mechanic's
Lien claimed by

.....,

..... Lienor,

on the Proceeds of the con-
tract of, Contrac-
tor, with the City of

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that on the day of, 19.., he caused to be filed with the comptroller of the City of, and with the head of department of of said city a notice of mechanic's lien on a public improvement, a copy of which notice is annexed hereto and made a part of this affidavit.

That no action for the foreclosure of said lien has been commenced and the time to institute such an action will expire on the day of, 19.., unless the said lien is continued by an order of this court.

That deponent does not desire to institute such action at this time because (state reasons) and therefore asks for an order continuing the said lien for a

²⁰ See § 18 of statute and § 210 of text.

period of six months from the date of the entry of such order.

That no previous application for such an order has been made.

Sworn to before me this }
 day of, 19.. }

.....

(Annex copy of notice of lien.)

FORM 11.

ORDER CONTINUING MECHANIC'S LIEN ON A PUBLIC IMPROVEMENT.

At a Special Term of the Supreme Court,
 held in and for the County of,
 at the County Court House, in the
 City of on the day
 of, 19..

Present — Hon., Justice.

<p>In the Matter of the Mechanic's Lien claimed by , Lienor, on the Proceeds of the Con- tract of, Contrac- tor, with the City of.....</p>	<p>}</p>
---	----------

Upon reading and filing the annexed affidavit of
, verified the day of,

19.., and upon the motion of, attorney for the lienor, it is

ORDERED, That the mechanic's lien on a public improvement filed by said with the comptroller of the City of, on the day of, 19.., and filed with the head of the department of, of said city, on the day of, 19.., against the moneys due and to become due upon a certain contract between and the said City of, dated the day of, 19.., for (describe contract) be and the same is hereby continued for a period of six months from the date hereof, to wit, until the day of, 19.., and the said comptroller of said City of is hereby directed upon the presentation of a certified copy of this order to redocket said lien accordingly, and to make a reference to this order thereon.

Enter:

.....,
Justice.

FORM 12.**SATISFACTION OF MECHANIC'S LIEN UPON REAL
PROPERTY.²¹**

State of New York, }
 County of } ss.:

WHEREAS, did heretofore on the day of, 19.., at o'clock, .. M., cause to be filed in the office of the Clerk of the County of, a Notice of Mechanic's Lien against the interest of as owner in the following described real property:

(Description.)

said do.. hereby certify that said lien is satisfied and the Clerk of the County of is hereby authorized and directed to cancel and discharge the same.

..... (L. S.)

(Acknowledgment.)

The same form may be followed in the case of a lien upon a public improvement. The satisfaction should be executed in duplicate and filed with the officers with whom the notice is filed. See § 21 of statute.

²¹ See § 187, sub-division 1 of § 19 of statute.

FORM 13.**NOTICE UNDER § 59.²²**

Supreme Court — County.

In the Matter of the Mechanic's
Lien upon Real Property,
claimed by

.....,

Lienor,

against

.....,

Owner.

To, Lienor:

PLEASE TAKE NOTICE that you are hereby required to commence an action to foreclose the mechanic's lien claimed in the notice of lien filed by you in the office of the Clerk of the County of, on the day of, 19.., at o'clock, .. M., against the interest of, as owner in the following described real property (description) within thirty days from the date of the service of this notice upon you, or to show cause at a Special Term of this Court, Part thereof, to be held in and for the County of, at the County Court House, on the day of, 19.., at o'clock, A. M., or as soon thereafter as counsel can be heard, why the said notice of lien filed

²² The notice may be served by the owner or a contractor. See § 198 and § 201 of text and § 59 and sub-division 3 of § 19 of statute.

by you as aforesaid, on the day of,
19.., should not be vacated and cancelled of record
and for such other and further relief as to the court
may seem just.

Yours, etc.,

.....,
(Owner or contractor.)

By,
Attorney,
Office & P. O. Address.

Dated,

FORM 14.**ORDER VACATING LIEN UNDER § 59.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, at,
on the day of, 19..

Present — Hon., Justice.

In the Matter of the Mechanic's
Lien upon the Real Property
claimed by

.....,

Lienor,

against

.....,

Owner.

Upon reading and filing the notice of (owner or contractor) to, the lienor herein, dated the day of, 19.., and the affidavit of due service of the same, and the affidavit of, verified the day of, 19.., showing that no action for the foreclosure of said lien has been commenced, and that said lien has not been otherwise discharged or cancelled of record, it is

ORDERED, That the said notice of lien filed by said, on the day of, 19.., at o'clock, .. M., in the office of the Clerk

of the County of, against the interest of
..... as owner in the following described
property:

(Description.)

be and the same hereby is vacated and cancelled of record, and the Clerk of the said County of is hereby directed to mark the docket of said lien vacated and cancelled of record with a reference to this order thereon.

.....,
Justice.

FORM 15.

**AFFIDAVIT FOR ORDER TO FIX AMOUNT OF UNDER-
TAKING FOR DISCHARGE OF MECHANIC'S LIEN
UPON REAL PROPERTY.²³**

Supreme Court — County.

In the Matter of the Mechanic's
Lien upon the Real Property
claimed by

.....,

Lienor,

against

.....,

Owner.

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that he is the owner (or a contractor with the owner) of the real property known as No. ... Street, in the City of, County of (Or description.) That on the day of, 19.., at .. o'clock, .. M., the above named filed a notice of mechanic's lien against the interest of your deponent (or against as owner, naming your deponent as contractor with said owner) as owner in said property, for the sum of Dollars.

²³ The undertaking may be given by the owner or contractor, before or after the commencement of the action. See § 187 and § 192 of text and sub-division 4 of § 19 of statute.

That your deponent desires to discharge the said mechanic's lien by the filing of an undertaking pursuant to the provisions of sub-division 4 of § 19 of Article 2 of the Lien Law, and therefore asks for an order fixing the amount of such undertaking.

(State whether an action has been commenced for the foreclosure of the lien and if so the status of such action.)

That no previous application for such an order has been made.

Sworn to before me this }
..... day of, 19..}

.....

FORM 16.**ORDER FIXING AMOUNT OF UNDERTAKING.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, at,
on the day of, 19..

Present — Hon., Justice.

In the Matter of the Mechanic's
Lien upon the Real Property
claimed by

.....,

Lienor,

against

.....,

Owner.

On reading and filing the annexed affidavit of
....., verified the day of
19.., and upon the motion of, his
attorney, it is

ORDERED, That the sum of Dollars
be and hereby is fixed as the amount of an undertaking
to be given by said to discharge the
mechanic's lien filed against the interest of
as owner of the following described real property,
(description) in the office of the Clerk of the County
of, on the day of, 19..
at o'clock, .. M., for the sum of
Dollars.

.....,

Justice.

FORM 17.**UNDERTAKING.**

KNOW ALL MEN BY THESE PRESENTS, That we, residing at, as principal; and, residing at, in the City of; and, residing at, in the City of, as sureties, are held and firmly bound unto the Clerk of the County of, his successors or assigns, in the sum of Dollars, lawful money of the United States, for which payment well and truly to be made, we do bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of, 19..

WHEREAS, has filed with the Clerk of the County of, on the day of, 19.., at o'clock, .. M., a notice of mechanic's lien for the sum of Dollars, against the interest of, as owner, in the following described real property, to wit:

(Description.)

AND WHEREAS, Hon., one of the Justices of the Supreme Court, has by an order duly entered in the office of the Clerk of the County of, on the day of, 19.., directed that said execute an undertaking in the sum of Dollars, for the purpose of discharging said lien pursuant to statute,

NOW, the condition of this obligation is such that if the above bounden, his heirs, executors or administrators, shall well and truly pay

any judgment that may be rendered against said property in any proceeding to enforce said lien then this obligation shall be void, otherwise to remain in full force and virtue.

..... (Seal.)
 (Seal.)
 (Seal.)

State of New York, }
 County of } ss.:

....., being duly sworn, says that he is one of the sureties executing the foregoing undertaking; that he is a resident and freeholder within the State of New York and is worth double the amount named in said undertaking, over and above all the debts and liabilities which he owes or has contracted, exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me this }
 day of, 19.. }

.....

(Same for other surety.)

State of New York, }
 County of } ss.:

On this day of, 19.., before me personally came, and, known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

To, Lienor.

PLEASE TAKE NOTICE, That an undertaking of which the foregoing is a copy will be presented for ap-

proval, and the sureties therein named will attend and justify before Hon., one of the Justices of the Supreme Court, at a Special Term, Part thereof, in the County Court House, County of, on the day of, 19.., at o'clock, .. M.

Dated,, 19..

.....,

Attorneys for,

Office and P. O. Address,

.....

The sureties having justified before me, the foregoing undertaking is hereby approved as to form and as to the sufficiency of sureties.

Dated,, 19..

.....,

Justice.

FORM 18.**ORDER DISCHARGING LIEN UPON REAL PROPERTY ON
UNDERTAKING FILED.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, at,
on the day of, 19..

Present — Hon., Justice.

In the Matter of the Mechanic's
Lien upon Real Property
claimed by

.....,

Lienor,

against

.....,

Owner.

An order having been heretofore made herein on
the day of, 19.., fixing the sum
of Dollars, as the amount of the under-
taking to be given by, owner (or
contractor) to discharge the mechanic's lien filed by
the above-named lienor in the office of the Clerk of
the County of, on the day
of, 19.., at o'clock, .. M., for the
sum of Dollars, against the interest
of, as owner in the following
described real property, to wit:

(Description.)

And said, together with
 and, as sureties, having duly executed such an undertaking in the required sum of Dollars, which undertaking is in the form required by law, and the same having on the day of, 19.., been approved as to form and sufficiency of sureties, by Hon., one of the Justices of this Court, now, on motion of, Attorney for, it is

ORDERED, That upon the filing of said undertaking bearing date the day of, 19.., with the Clerk of the County of, the said mechanic's lien filed by, on the day of, 19.., at o'clock, .. M., in the office of the Clerk of the County of, for the sum of Dollars, against the interest of, in the aforesaid real property, be and the same hereby is discharged of record, and said clerk is hereby directed to so mark the docket of said lien, with a reference to this order thereon.

.....,

Justice.

FORM 19.

**OFFER TO DEPOSIT MONEY, ETC., TO DISCHARGE
MECHANIC'S LIEN UPON REAL PROPERTY
AFTER ACTION BEGUN.²⁴**

Supreme Court — County.

..... Plaintiff, against Defendant.	}
---	---

PLEASE TAKE NOTICE, That,
 the defendant above named and owner in fee (or
 otherwise) of the real property and improvements
 against which is filed the mechanic's lien to enforce
 which this action is brought, hereby offers to pay into
 court the sum of \$....., (or to execute and
 deposit the following securities, to wit:)
 in discharge of the said mechanic's lien claimed
 by, the plaintiff herein, filed in the
 office of the Clerk of the County of, on
 the day of, 19.., at o'clock, .. M.,

²⁴ See § 200 of text and § 55 of statute, as to courts not of record.

against the interest of, as owner, in
the following described property, to wit:

(Description.)

Dated,, 19..

.....,
Owner,

By,
Attorney.

To,
Clerk of the County of,
.....,
Plaintiff.

FORM 20.

ACCEPTANCE OF OFFER.

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

....., the plaintiff and lienor herein,
hereby accepts the offer of, the
owner and defendant herein, to pay into court the
sum of \$....., (or to deposit securities, etc.,

as in offer) in discharge of the mechanic's lien of said, filed in the office of the Clerk of the County of, on the day of, 19.., at o'clock .. M., against the interest of, as owner, in the following described property, to wit:

(Description.)

Dated,, 19..

.....,

Plaintiff and Lienor.

By,

Atty. for Plaintiff.

To,

Clerk of the County of

.....,

Owner.

FORM 21.**ORDER DISCHARGING LIEN ON ACCEPTANCE OF OFFER.²⁵**

At a Special Term, Part, of the
 Supreme Court, held in and for the
 County of, at the County
 Court House, at, on the
 day of, 19..

Present — Hon., Justice.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

Upon reading and filing the affidavit of
, verified the day of, 19..
 showing an offer of, owner and
 defendant herein, dated the day of,
 19.., addressed to, plaintiff and
 lienor herein, and filed in the office of the Clerk of the
 County of, on the day of,
 19.., offering to pay into court the sum of
 Dollars, (or to deposit securities, etc.,) in discharge
 of a certain mechanic's lien claimed by said
, and showing also the acceptance of said
 offer by, dated the day of
, 19.., and filed in the office of said Clerk

²⁵ This order should be accompanied by an affidavit showing the making and acceptance of the offer named.

of the County of, on the day of, 19.., upon the motion of Esq., Attorney for, owner and defendant herein, it is

ORDERED, That upon the deposit by said owner and defendant, of the sum of Dollars, with the Clerk of the County of, (or upon the deposit by said of the following securities with said Clerk of the County of, to wit,) the said mechanic's lien filed by, for the sum of Dollars, in the office of the Clerk of the County of on the day of, 19.., at o'clock, .. M., against the interest of as owner in the following described real property, to wit: (Description) be and the same hereby is discharged, and the Clerk of the County of is hereby directed to so mark the docket of said lien and to make a reference to this order thereon.

Enter:

.....,
Justice.

FORM 22.

**AFFIDAVIT TO SECURE DISCHARGE OF MECHANIC'S LIEN
UPON REAL PROPERTY BY PAYMENT OF
MONEY INTO COURT.²⁶**

Supreme Court — County of

.....,	}
Plaintiff,	
against	
.....,	
Defendants.	

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that he is one of the defendants and the owner (or contractor) herein. That this action is for the foreclosure of a mechanic's lien filed by the plaintiff for the sum of Dollars, in the office of the Clerk of the County of, on the day of, 19.., at o'clock, .. M., against the interest of as owner in the following described real property, to wit:

(Description of Property).

(If other liens have been filed give details of each, stating whether the lienors are parties defendant to the action, also the status of the action, etc.)

That the contract under which the liens are claimed,

²⁶ See § 20 of statute and §§ 187 and 200 of text. Five days' notice of motion to all parties is necessary.

is between as owner and
as contractor, upon which a balance of Dollars
is due and unpaid. That no claim is made by any
lienor for any amount in excess of this unpaid balance,
(or otherwise, according to facts).

That this affidavit is made in support of a motion
for an order fixing the amount of moneys to be de-
posited with the said County Clerk sufficient to pay
any judgment which may be recovered in this action,
for the purpose of discharging said liens.

That no previous application for such an order has
been made.

Sworn to before me this }
..... day of, 19.. }

.....

FORM 23.**ORDER DISCHARGING MECHANIC'S LIEN UPON REAL
PROPERTY UPON PAYMENT OF MONEY INTO COURT.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House at the City
of, on the day
of, 19..

Present — Hon., Justice.

.....,	}
Plaintiff,	
against	
.....,	
Defendants.	}

A motion having been previously made herein for an order fixing the amount of a deposit to be made for the purpose of discharging certain mechanic's liens upon real property, and said motion having duly come on to be heard on the day of, 19..,

Now, upon reading and filing the notice of motion herein, the affidavit of, verified the day of, 19.., of the due service thereof upon all parties to this action, and the affidavit of, verified the day of, 19.., on motion of, Attorney for, owner (or contractor), it is

ORDERED, That upon the deposit by said

....., owner and defendant, of the sum of Dollars, with the Clerk of the County of, the said mechanic's lien filed by for the sum of Dollars, in the office of the Clerk of the County of, on the day of, 19.., at o'clock, .. M., against the interest of, as owner in the following described property, to wit: (Description) be and the same hereby is discharged, and the Clerk of said County of is hereby directed to so mark the docket of said lien and to make a reference to this order thereon.

(If there is more than one lien make a similar provision for the discharge of each.)

Enter:

.....,

Justice.

FORM 24.

**AFFIDAVIT FOR ORDER FIXING AMOUNT OF DEPOSIT OF
MONEY TO DISCHARGE A LIEN ON A PUBLIC
IMPROVEMENT.²⁷**

Supreme Court —County.

<p>In the Matter of a Mechanic's Lien on a Public Improve- ment, filed by, Lienor, against Moneys due to Contractor with the City of</p>	}
--	---

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that on the day of, 19.., he entered into a contract with the City of, for (describe contract). That a notice of mechanic's lien has been filed by, against the moneys due and to become due from said City of to deponent on account of said contract, which notice was filed with the comptroller of said city on the day of, 19.., and with the head of department of of said city on the day of, 19.., and by

²⁷ See § 211 of text and § 21 of statute.

which notice of lien the sum of Dollars is claimed.

(State whether an action has been commenced and if so the status of it.)

That deponent desires to have said lien discharged by depositing with the said comptroller of said City of the amount claimed by said notice of lien, with interest thereon for one year amounting to Dollars, together with such additional amounts as this court shall direct. That this affidavit is made in support of a motion for an order fixing the amount of money to be deposited by your deponent to obtain such discharge.

That no previous application for such an order has been made.

Sworn to before me this }
..... day of, 19.. }

.....

FORM 25.**ORDER FIXING THE AMOUNT OF DEPOSIT OF MONEY TO
DISCHARGE A LIEN ON A PUBLIC IMPROVEMENT.**

Supreme Court — County.

In the Matter of a Mechanic's
Lien on a Public Improve-
ment, filed by

.....,

Lienor,

against

Moneys due to,

Contractor with the City
of

Upon reading and filing the annexed affidavit of
....., verified the day of,
19.., whereby it appears to my satisfaction that
..... has on the day of,
19.., filed a notice of mechanic's lien for the sum of
..... Dollars, with the comptroller of the City
of and with the head of department of
..... of said city, against the moneys due and
to become due to a contractor with
the said City of for (describe contract).

Now, on motion of, Attorney for
....., said contractor, it is

ORDERED, That upon the deposit by said
with the comptroller of said City of, of the
sum of Dollars, that said lien of
be discharged and that the said comptroller shall so

mark the docket of the same, with a reference to this order thereon.

Dated,

Enter:

.....,

Justice.

FORM 26.

AFFIDAVIT FOR ORDER FIXING AMOUNT OF UNDERTAKING FOR DISCHARGE OF A MECHANIC'S LIEN ON A PUBLIC IMPROVEMENT.²⁸

Supreme Court — County.

In the Matter of the Mechanic's
Lien claimed by

.....,

Lienor,

against

the Moneys due and to become due to,

Contractor, with the City
of

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that on the day of, 19.., caused to be filed with the comp-

²⁸ See § 211 of text.

troller of the City of and with the head of department of of said city, a notice of mechanic's lien for the sum of Dollars, and against the moneys due and to become due to your deponent as contractor under a certain contract with the City of, dated the day of, 19.., for (describe contract.)

That your deponent desires to have such lien discharged upon the filing of an undertaking in such amount as this court shall direct and conditioned for the payment of any judgment which may be recovered in an action brought for the enforcement of said lien.

(State whether the action has been commenced and if so the status thereof.)

That this affidavit is made in support of a motion for an order fixing the amount of such undertaking.

That no previous application for such an order has been made.

Sworn to before me this }
 day of, 19.. }

.....

FORM 27.

**ORDER FIXING THE AMOUNT OF AN UNDERTAKING FOR
THE DISCHARGE OF A MECHANIC'S LIEN ON
A PUBLIC IMPROVEMENT.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

Present — Hon., Justice.

<p>In the Matter of the Mechanic's Lien claimed by, Lienor, against the Moneys due and to be- come due to, Contractor, with the City of</p>	}
---	---

Upon reading and filing the annexed affidavit of
....., verified the day of,
19.., and upon the motion of, Attor-
ney for, it is

ORDERED, That the sum of Dollars be
fixed as the amount of an undertaking to be given by
said, for the discharge of a certain
mechanic's lien on a public improvement filed by said
..... with the comptroller of the City of
..... and with the head of department of

of said city on the day of, 19.., against the moneys due and to become due from the City of to said, under a contract for (describe contract).

Enter:

.....,
Justice.

FORM 28.

UNDERTAKING FOR THE DISCHARGE OF A MECHANIC'S LIEN ON A PUBLIC IMPROVEMENT BY SURETY COMPANY.²⁹

KNOW ALL MEN BY THESE PRESENTS that, (contractor) residing at, as principal, and the Surety Company, a domestic corporation with its principal office at in the City of, as Surety, are held and firmly bound unto the City of, in the sum of Dollars, lawful money of the United States of America to be paid to the said City of, for which payment well and truly to be made, we bind ourselves, our executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this day of, 19..

WHEREAS, on the day of, 19.., (lienor) filed a notice of lien for the

²⁹ See also Form 17. Note also § 21 of the Statute as amended by Laws of 1914, providing that where a certificate of solvency has been issued by the Superintendent of Insurance to a fidelity or surety company no justification or notice thereof shall be necessary.

sum of Dollars with the comptroller of the City of and with the head of department of of said city, against the moneys due and to become due to the said (contractor) from said city on a certain contract for (describe contract).

WHEREAS, by an order of the Supreme Court duly entered in the office of the Clerk of the County of, on the day of, 19.., the amount of an undertaking to be executed for the purpose of discharging said lien is fixed at the sum of Dollars,

NOW THEREFORE, the condition of this obligation is such that if the above bounden, his executors or administrators, shall well and truly pay any judgment which may be recovered in an action to enforce said lien, then this obligation shall be void, otherwise to remain in full force and virtue.

..... (Seal.)
(Contractor.)

..... (Seal.)
(Surety Company.)

Attest: By

.....


State of New York, }
County of } ss.:

On the day of, 19.., before me personally came, to me known, who, being duly sworn, did depose and say that he resides in the City of; that he is an attorney-in-fact of the SURETY COMPANY, the

corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal attached to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided by law.

Sworn to before me this }
 day of, 19.. }

.....

 Power of Attorney from the Surety Company to its agents together with a copy of the resolution of its Board of Directors authorizing the same must be attached, together with a statement of the financial condition of the company.

State of New York, }
 County of } ss.:

On this day of, 19.., before me, the undersigned, personally came and appeared, to me known, and known to me to be the individual described in and who executed the within instrument, and he acknowledged to me that he executed the same.

To, Lienor.

PLEASE TAKE NOTICE that an undertaking of which the foregoing is a copy, will be presented for approval, and the sureties therein named will attend and justify before Hon., one of the Justices of the Supreme Court, at a Special Term,

Part thereof, in the County Court House,
County of, on the day of,
19.., at o'clock, .. M.

Dated,, 19..

.....,

Attorney for,

Office & P. O. Address,

The sureties having justified before me, the fore-
going undertaking is hereby approved as to form and
as to the sufficiency of sureties.

Dated,

.....,

Justice.

,

FORM 29.**ORDER TO DISCHARGE MECHANIC'S LIEN ON PUBLIC
IMPROVEMENT UPON FILING OF AN UNDERTAKING.**

At a Special Term of the Supreme Court,
Part thereof, held in and for
the County of, at the County
Court House, in the City of,
on the day of, 19..

Present — Hon., Justice.

In the Matter of the Mechanic's
Lien claimed by

.....,

Lienor,

against

the Moneys due and to be-
come due to,

Contractor, with the City
of

An order having been heretofore made herein on
the day of, 19.., fixing the sum of
..... Dollars as the amount of the undertaking
to be given by, Contractor, to dis-
charge the mechanic's lien filed by
with the comptroller of the City of, on the
..... day of, 19.., for the sum of
Dollars, against the moneys due and to become due
from said City of to said,
contractor under a certain contract between said city
and said for (describe contract.)

And said together with the Surety Company as surety having duly executed such an undertaking in the required sum of Dollars, which undertaking is in the form required by law and the same having on the day of, 19.., been approved as to form and sufficiency of the surety thereon, by Hon., one of the justices of this court,

Now, on motion of, attorney for, it is

ORDERED, That upon the filing of said undertaking bearing date of day of, 19.., with the comptroller of the City of, the said mechanic's lien filed by said, on the day of, 19.., with the comptroller of said city of, for the sum of Dollars, against the moneys due and to become due under a certain contract between said as contractor and the said City of, for the (describe contract) be and the same hereby is discharged of record and the said comptroller of said City of is hereby directed to so mark the docket of said lien upon the filing of said undertaking as aforesaid and the presentation of a certified copy of this order, and to make a reference to this order upon said docket.

Enter:

.....,

Justice.

FORM 30.**NOTICE OF PENDENCY OF ACTION FOR THE FORECLOSURE
OF A MECHANIC'S LIEN UPON REAL PROPERTY.⁸⁰**

Supreme Court — County of

<p>.....,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">against</p> <p>.....,</p> <p style="text-align: right;">Defendants.</p>	}	<p>Notice of Pendency of Action.</p>
---	---	--

Notice is hereby given that an action has been commenced and is pending in this court, upon a complaint of the above named plaintiff against the above named defendants, for the foreclosure of a certain mechanic's lien, for the sum of Dollars, filed by the plaintiff, and docketed in the office of the Clerk of the County of, on the day of, 19.., at o'clock, .. M., against the interest of as owner in the following described real property, to wit:

(Description.)

That the said premises affected by the above action were at the time of the commencement thereof, and at the time of the filing of this notice situated in the City of, in the County of

Dated,, 19..

.....,
Attorney for Plaintiff.

⁸⁰ See § 189 of text, and § 17 of statute.

To the Clerk of the County of:

You will please index the above notice to the name of the foregoing defendants, to wit:

.....,
.....

.....,

Attorney for Plaintiff.

FORM 31.

NOTICE OF PENDENCY OF ACTION FOR THE FORECLOSURE OF A MECHANIC'S LIEN UPON A PUBLIC IMPROVEMENT.⁸¹

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendants.	

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this Court upon the complaint of the above named plaintiff against the above named defendants for the foreclosure of a certain mechanic's lien upon a public improvement in the sum of Dollars, notice of which was filed with the comptroller of the City

⁸¹ See § 18 of statute and §§ 203 to 212 of text.

of, on the day of, 19..,
 at o'clock, .. M., and with the head of the depart-
 ment of of said city on the day of
, 19.., said lien being upon the moneys due
 and to become due from said City of to
 as contractor under a certain con-
 tract between him and said city, dated the day
 of, 19.., for, etc., (describe contract).

Dated,

.....,
 Atty. for Plaintiff.

To the Comptroller of the City of

FORM 32.

COMPLAINT FOR FORECLOSURE OF MECHANIC'S LIEN ON REAL PROPERTY.³²

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

I. Preliminary allegations.

II. Upon information and belief, that at all times
 hereinafter mentioned was and still

³² See § 220.

is the owner in fee of the following described real property, to wit: (Insert description.)

III. That on or about and between the day of, 19.., and the day of, 19.., this plaintiff, at the special instance and request of the defendant, furnished and delivered at the premises above described certain goods, wares and merchandise, consisting of and of the reasonable value of \$....., which said sum said defendant agreed to pay therefor.

IV. That no part of said sum of \$..... has been paid except the sum of \$....., leaving a balance due and unpaid of \$....., payment of which has been heretofore demanded and refused.

V. That said materials furnished and delivered by this plaintiff were furnished and delivered for the improvement of the real property, hereinabove described and were furnished and actually used in and about the erection, construction and completion of the buildings erected upon said premises, and were so furnished with the knowledge, consent and at the request of the defendant.....^(owner)

VI. That by reason of the premises the defendant was at the time of the filing and docketing by this plaintiff of his mechanic's lien, hereinafter mentioned, indebted to this plaintiff in the sum of \$....., with interest from the day of, 19..

VII. That on or about the day of, 19.., at o'clock, .. M., and within 90 days after the date of the final furnishing of the said material, this plaintiff caused to be filed in the office of the Clerk of the County of, a notice of me-

chanic's lien, a copy of which is annexed hereto, marked Exhibit A, and made part of this complaint.

VIII. That said lien has not been paid, cancelled or discharged and no other proceeding at law or in equity has been brought by this plaintiff for the foreclosure of the same or for the recovery of the moneys secured thereby.

(If the notice was served on the owner, so allege.)

IX. Upon information and belief that the defendants, and each have or claim to have some interest in or lien upon the premises above described, which interest or lien, if any, the plaintiff alleges is subsequent to the lien of the plaintiff.

WHEREFORE, the plaintiff demands judgment,

(1). That the court adjust and determine the equities of all of the parties to this action and decide as to the justice, extent and priority of the various liens and claims herein.

(2). That the plaintiff be adjudged to have acquired by the filing and docketing of its mechanic's lien as aforesaid a just and valid lien upon the interest of the said in the premises aforesaid, for the sum of Dollars, with interest thereon from the day of, 19.., and costs and disbursements of this action.

(3). That the defendants and each of them and all persons claiming under them or any of them be forever foreclosed of all equity of redemption or other interest in said property.

(4). That the interest of said in said real property be sold according to law, and the proceeds of such sale after the payment of the expenses of said sale be applied to the payment of the

plaintiff's lien together with the costs and disbursements of this action.

(5). That the plaintiff have a judgment for any deficiency that may then remain against the defendant
.....

(6). That the plaintiff have such other and further relief as to the court may seem just and equitable.

.....,
Attorney for

(Verification.)

FORM 33.

COMPLAINT ALLEGING FRAUDULENT TRANSFER.

As in form 32, adding:

That upon information and belief the 'defendant
....., by an instrument in writing under seal, purporting to be a deed of the premises herein described, dated the day of, 19.., attempted to convey said premises to the defendant
....., which alleged deed was recorded in the office of the Register of the County of, on the day of, 19.., in liber, etc.

That upon information and belief said alleged deed was executed and delivered by the defendant,
....., with the intent to hinder, delay and defraud the creditors of said defendant, including this plaintiff, and that said deed was made, executed and delivered without consideration and that the defendant paid no con-

sideration for the attempted transfer to him of the said premises.

That upon information and belief the defendant, made, executed and delivered the said alleged deed for the purpose of evading the provisions of the Lien Law of the State of New York and of evading this plaintiff's lien and claim as herein set forth of which both the defendant and had full knowledge and notice.

To prayer for relief add:

That the deed made by the defendant to the defendant, of the premises described aforesaid and dated the day of, 19.., and recorded in the office of the Register of the County of, on the day of, 19.., etc., be adjudged fraudulent and void and of no effect against this plaintiff's mechanic's lien.

FORM 34.

COMPLAINT ALLEGING DISCHARGE OF LIEN UPON FILING OF UNDERTAKING.

As in form 32, adding:

That on the day of, 19.., the defendant filed in the office of the Clerk of the County of, an undertaking unto the said Clerk of the County of, with the surety of and, duly executed by said and by said defendants and, (sureties) in the sum of Dollars, conditioned for the payment of any judgment which may be recovered in an action to enforce

said lien of the plaintiff, and that the said undertaking was duly approved before filing by one of the justices of this court, and an order was made discharging the plaintiff's lien and directing its cancellation, which was duly entered and filed in the office of the Clerk of the County of, on the day of, 19.., and said lien of the plaintiff was thereupon cancelled and discharged of record.

To prayer for relief add:

That the said notice of lien so filed by the plaintiff be adjudged to be a valid lien against the interest of said as owner in said real property until the time of the cancellation and discharge thereof and that the sureties on said undertaking given to discharge the said lien be adjudged liable by virtue thereof to the plaintiff for the amount of his said lien with interest and costs and disbursements of this action, and that judgment be rendered in form only against said property.

FORM 35.

COMPLAINT ALLEGING DISCHARGE OF LIEN BY DEPOSIT.

As in form 32, adding:

That on the day of, 19.., the defendant paid into the hands of the Clerk of the County of, the sum of \$....., being the amount claimed by the plaintiff in his notice of lien aforesaid with interest thereon to the date of the deposit and thereupon said lien was marked in the lien docket "discharged by payment" by the said Clerk of the County of

(If the deposit is made upon the order of the court, recite the same, with the particulars thereof).

To prayer for relief, instead of 4, 5, and 6, substitute the following:

(4). That out of the sum of \$. paid by the defendant to the Clerk of the County of, on the day of, 19.., this plaintiff recover the amount due him with interest to the time of payment, and that the County Treasurer of the County of be directed to pay over the said sum and interest accrued thereon, or so much thereof as may be necessary, to this plaintiff.

(5). That if said sum be insufficient therefor, that the plaintiff have judgment for such deficiency against the defendant

(6). That this plaintiff be paid his costs and disbursements of this action out of said sum in the hands of the County Treasurer if the same be sufficient therefor and if not that he recover said costs and disbursements of the defendant

FORM 36.

**COMPLAINT FOR FORECLOSURE OF LIEN ON REAL PROP-
 ERTY BY CONTRACTOR WITH LESSEE ALLEGING
 OWNER'S CONSENT TO IMPROVEMENT, ALSO
 ALLEGING RECOVERY OF A JUDGMENT ON
 THE DEBT AND RETURN OF EXECUTION
 UNSATISFIED.**

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

I. Preliminary allegations.

II. That on or about the day of, 19.., the plaintiff made and entered into a contract in writing with the defendant, the lessee in possession of the premises hereinafter described, whereby the plaintiff agreed to furnish certain materials to be used in improving the said house, building or appurtenances upon the said premises, with tapestry, wood work, painting, decorations, etc., and to perform the necessary work, labor and services in connection therewith as provided for in said contract, which is dated the day of, 19.., and a copy of which is annexed hereto and marked Exhibit A and made a part hereof. That the price agreed upon for the materials and work, labor and services to be furnished and performed under the said contract was \$.....

III. That the said premises on which the building was located, and in which said building the said materials were used, and the said work, labor and services were performed, are situated in the, etc. (Describe property.)

IV. That between the day of, 19.., and the day of, 19.., both dates inclusive, the plaintiff entered into and upon the performance of the said contract with the defendant, and furnished all the materials called for in and by said contract and agreed to be furnished, and performed all the work, labor and services in connection therewith, and fully carried out and performed the said contracts and agreements in every respect, except that the plaintiff did not complete the decoration of one room provided for in said contract and accordingly allowed the defendant therefor the sum of \$....., which modification was agreed to by said and said allowance of \$..... was accepted.

That on or about the day of, 19.., the plaintiff and defendant, upon the plaintiff making the aforesaid allowance of \$....., modified and changed the said contract hereinbefore referred to and agreed that all the money due and to grow due under the said contract should forthwith become due and payable. That at the same time said defendant executed and delivered to the plaintiff his promissory note dated the day of, 19.., whereby he promised to pay on demand to the plaintiff the sum of \$..... with interest at 6% from that date, the said sum of \$..... being the aggregate of the amounts due for the work, labor and services performed and materials furnished by the plaintiff after deducting all just claims and credits.

V. That the plaintiff has duly demanded payment of said note and the said note has not been paid, and that the said sum of \$. with interest thereon at 6% from the day of, 19.., is still unpaid and owing to the plaintiff, and that said labor and materials were performed and furnished for and were actually used in and upon the said building on the premises above described.

That the plaintiff herein obtained judgment against said defendant on the day of, 19.., upon said note for the sum of \$., and that said judgment was duly docketed in the office of the Clerk of the County of, and thereafter execution upon said judgment against the property of said was duly issued to the Sheriff of the County of and that said execution was prior to the commencement of this action returned wholly unsatisfied, and that said judgment remains wholly unpaid.

VI. That the defendant is and was at all times hereinafter mentioned the owner in fee of the premises hereinbefore described and on the day of, 19.., executed a lease thereof to the defendant for the term of years from that date, and that thereafter the said entered into and continued in the possession of the said premises, and was in the possession of the same during the entire period when the said materials were furnished and the said work, labor and services performed in connection therewith, in and about the said building. (Annex copy of lease.)

VII. That the said defendant, the said owner in fee of said premises, consented to the furnishing of the said materials and the performance of the said work, labor and services in and about the said building, and the said labor and materials for

which the plaintiff claims a lien were duly performed and furnished by the plaintiff with the knowledge and consent of the said owner, and were actually performed and used in the decoration, alteration, and repair of the said building with the said knowledge and consent of the said owner.

VIII. That on the day of, 19.., the time of the filing of the lien hereinafter referred to, the plaintiff was entitled to receive from the defendant, the sum of \$...... and interest thereon from the day of, 19.., which sum is still due from the said defendant to the plaintiff.

IX. That on the day of, 19.., and within 90 days after the completion of the work and the final furnishing of the materials provided for in said contract the plaintiff filed a notice of lien in writing in the office of the Clerk of the County of, a copy of which is annexed hereto, marked Exhibit C and made part hereof.

X. (Allege service of copy of lien on owner if so served.)

XI. That no other persons have filed liens against said property and that there are no subsequent liens or claims by judgment, mortgage or conveyance upon the said premises against which the lien is asserted.

WHEREFORE the plaintiff demands judgment,

(1). That the plaintiff be adjudged to have a lien upon said premises for \$...... with interest thereon from the day of, 19..

(2). That the defendants and and all persons claiming under them be foreclosed of all equity of redemption or other interest in said property.

(3). That the interest of the defendants and in said premises be sold as required by

law and that from the proceeds of such sale plaintiff be paid the amount of its lien aforesaid, and interest thereon from the day of, 19.., together with the expenses of sale and the costs of this action.

(4). That the court determine the equities of all parties hereto and decide the extent, justice and priority of the claims of all parties who have filed or obtained liens upon the said property and shall establish said liens and claims.

(5). That the plaintiff may have such other and further relief as to the court may seem just and equitable.

.....,
Attorney for Plaintiff.

(Verification.)

FORM 37.**COMPLAINT — LIEN ON A PUBLIC IMPROVEMENT.³³**

Supreme Court — New York County.

P. H. M.,

Plaintiff,

against

J. D. M. Company and City
of N. Y.,

Defendants.

I. Allegations of incorporation of city, and other parties, etc.

II. Upon information and belief, that on the 3rd day of June, 1904, the defendant J. D. M. Company entered into a contract in writing with the City of New York, by the Armory Board of said city for the erection and completion of an armory building for the 69th Regiment of Infantry, National Guard of New York, upon the westerly side of Lexington Avenue, extending from 25th to 26th Streets in the Borough of Manhattan, City of New York, pursuant to plans and specifications referred to in said contract, for the sum of \$619,522.00. That said contract was duly executed in accordance with the laws of this state and the said City of New York thereby became bound by its terms.

III. Upon information and belief, that after the making of said contract said defendant, J. D. M. Company, entered upon its performance and that at the time of the filing of the notice, claim and lien by the

³³ See § 222 of text.

plaintiff as hereinafter set forth said contractor had performed part of the conditions of said contract on its part to be performed, and had so far completed the same as to become entitled to a payment on account of said contract, and that there were then moneys under the control of the said defendant, City of New York, far in excess of the plaintiff's claim, and all others having claims prior to the plaintiff. That the value of the labor and materials performed and furnished by said J. D. M. Company on said contract at the time of the filing of the notice of lien hereinafter set forth was upwards of \$610,000.00, and that it had received on account only about the sum of \$527,000.00.

IV. That heretofore and on or about the 22nd day of August, 1904, the plaintiff above named entered into a certain contract in writing with the defendant J. D. M. Company, wherein and whereby the plaintiff agreed to and with said J. D. M. Company to provide all the materials and to perform the work necessary in and about the doing and completing of all the plastering required and used in the erection and completion of the said public improvement as called for by the plans and specifications referred to in said contract between said J. D. M. Company and the City of New York, for the sum of \$14,797.00. That a copy of said contract is hereto annexed and made part hereof.

V. That thereafter this plaintiff entered upon the performance of the said work, and duly performed, provided and furnished, for said defendant, J. D. M. Company, all the work, labor and materials necessary in and about the doing and completing of the said plastering work and had on or about the 1st day of November, 1906, duly performed all and singular the terms, covenants and conditions of said contract on his part to be performed. That during the per-

formance of the said work the plaintiff performed and furnished certain extra work, labor and materials to the said J. D. M. Company, at its special instance and request, in and upon the said public improvement of a like kind and nature to that mentioned in said contract made by the plaintiff and said J. D. M. Company and for which work, labor and materials the said J. D. M. Company agreed to pay the plaintiff the sum of \$2,300.00.

VI. That said J. D. M. Company has paid from time to time on account of the said contract and the said extra work the aggregate sum of \$12,880.00, leaving a balance justly due and owing upon the same amounting to \$4,200.00 no part of which has been paid. That the said labor and materials were actually performed and furnished in and for the construction of the said public improvement pursuant to said contract between the defendant J. D. M. Company and the City of New York.

VII. That in pursuance of and in conformity with the Lien Law of the State of New York this plaintiff on the 3rd day of December, 1906, duly filed with the comptroller of the City of New York who is the financial officer of said city, and with the Armory Board of said city, which is the head of the department having charge of the work under the said contract existing between the said defendant, J. D. M. Co., and the said City of New York, a notice of lien in writing stating the place of residence of this plaintiff as claimant, the name of the contractor for whom the labor was performed and the materials furnished, the amount claimed to be due and the date when due, a description of the public improvement upon which the labor was performed and materials furnished with a general description of the contract pursuant to which said public improvement was constructed, which said no-

tice of lien was duly signed by and verified by the oath of this plaintiff, as claimant, and complied in all respects with the requirements of § 12 of Article 2 of Chapter 38, of the Laws of 1909, known as the Lien Law, and at the time of the filing thereof 30 days had not elapsed since the completion of the said public improvement and the acceptance of the same by the City of New York.

VIII. That neither the said lien nor the claim upon which the same is founded has been waived, satisfied or discharged, and that no other proceeding at law or in equity has been commenced for the foreclosure of said lien or the recovery of the amount due to the plaintiff as aforesaid.

IX. On information and belief that at the time of the filing of the lien of the plaintiff as herein alleged the defendant, J. D. M. Company, had so far completed its said contract with the City of New York that there was then due and owing to the said defendant, J. D. M. Co., by reason of the said contract and of the extra work performed by the said J. D. M. Company in and upon the said public improvement, at the special instance and request of the defendant, the City of New York, the sum of \$93,000.00, which said sum had been duly certified by the architects named in the said contract and by the Armory Board of the City of New York, to be due as herein alleged and that upon the final completion and acceptance of the said building there will become due, on account of the said contract to the defendant J. D. M. Company, the further sum of \$3,000.00.

X. That more than 30 days have elapsed since the claim upon which this action is founded was presented to the comptroller of said defendant, the City of New York, and that he has neglected and refused to make

an adjustment or payment thereof for more than 30 days after its presentment.

XI. Upon information and belief that the defendants herein other than J. D. M. Company and the City of New York have or claim to have some lien or interest in or upon said funds due and to become due under said contract between the defendant, J. D. M. Company, and the City of New York.

WHEREFORE, the plaintiff prays that it may be adjudged and decreed:

(1.) That the plaintiff's claim is a valid lien upon the funds now due or to become due from the City of New York to the defendant, J. D. M. Company, under their said contract.

(2.) That the said City of New York and the comptroller of said city pay over to this plaintiff out of the said funds due or to become due under said contract, the amount adjudged herein to be due to this plaintiff from the said defendant, J. D. M. Company, together with interest thereon and the costs of this action, and that the plaintiff have judgment against the City of New York therefor.

(3.) That this plaintiff have such other and further relief as to this court may seem just and proper in the premises and that it decide upon the justice and equity and priority of the claims of this plaintiff and the defendants who claim some lien or interest in and upon said funds.

.....,

Attorney for Plaintiff.

(Verification.)

FORM 38.

ANSWER — SETTING UP DEFENDANT'S LIEN.³⁴

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

For a First Defense.

I. The defendant admits the allegations contained in paragraphs marked, and of plaintiff's complaint.

II. The defendant denies that he has any information sufficient to form a belief as to the allegations contained in paragraphs marked, and of plaintiff's complaint.

For a Second Defense.

III. And the defendant further answering and for the purpose of foreclosing a mechanic's lien hereinafter mentioned, alleges as follows: The defendant repeats and alleges all and singular the allegations and statements in paragraphs marked, and of plaintiff's complaint as fully as if the same were here specifically set forth, and alleges that is the owner of the real property described in the complaint, which description the

³⁴ See § 223 of text.

defendant repeats and alleges, and against whose interest the mechanic's lien hereinafter mentioned was filed.

(Continue with other allegations as in complaint.)

FORM 39.

AFFIDAVIT FOR ORDER TO SHOW CAUSE WHY ACTIONS SHOULD NOT BE CONSOLIDATED.³⁵

Supreme Court — County.

<p>.....,</p> <p style="margin-left: 100px;">Plaintiff,</p> <p style="margin-left: 100px;">against</p> <p>.....,</p> <p style="margin-left: 100px;">Defendants.</p>	}
---	---

(Also other titles.)

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that at all times hereinafter mentioned he was and still is the owner in fee (or otherwise) of the real property in the City of, County of, more particularly described as follows:

(Description.)

That on the day of, 19.., at
.... o'clock, .. M., the defendant,,

³⁵ See § 215 of text and § 43 of statute.

caused to be filed in the office of the Clerk of the County of a notice of mechanic's lien against the interest of your deponent as owner in said real property for the sum of Dollars.

(Make a similar statement as to all other mechanic's liens filed.)

That on the day of, 19..., by, his attorney, commenced this action against deponent and others as defendants, for the foreclosure of his said lien. That a copy of the summons and complaint in that action is annexed hereto, and made a part of this affidavit. That deponent has appeared in said action by, his attorney, and has answered (or his time to answer, etc., will expire on, etc.)

That on the day of, 19..., by, his attorney, commenced an action in this court against deponent and others for the foreclosure of his said lien. That a copy of the summons and complaint in that action is annexed hereto and made part of this affidavit.

That deponent has appeared in said action by, his attorney, (that he has answered, or his time to answer will expire, on the, etc.).

(Make a similar recital as to all other pending actions, giving the court in which each is pending, the date of commencement, etc.)

That deponent desires to defend each and all the alleged causes of action set forth in the complaints in the said several actions.

(State ground of defense.)

That all of the issues raised or to be raised in the several actions and the rights of all parties thereto can be litigated and determined in one action; and unless the actions above referred to are consolidated, deponent will be subjected to unnecessary expense in

separately defending each of the aforesaid actions, and will be hindered and injured by a multiplicity of suits, and for that reason an order is requested directing each of the parties to the several actions aforesaid to show cause why each of said other actions should not be consolidated with this action.

That the parties to the several actions have appeared by their several attorneys as follows:

.....,

.....

That no previous application for the order herein asked for has been made.

Sworn to before me this }
 day of, 19.. }

.....

FORM 40.

**ORDER TO SHOW CAUSE WHY ACTIONS SHOULD NOT BE
CONSOLIDATED.**

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendants.	

Upon the annexed affidavit of,
verified the day of, 19.., let
....., (naming all parties to the various actions) show cause at a Special Term, Part, of this court, to be held at the County Court House in the County of on the day of, 19.., at o'clock, A. M., or as soon thereafter as counsel can be heard, why the action of against
....., now pending in this court, and the action of against, now pending in the Court (recite all actions) should not be consolidated, and for such other and further relief as to the court may seem just.

Service of a copy of this order on each of the parties to said actions or on their respective attorneys on or before the day of, 19.., at o'clock, .. M., shall be sufficient.

Dated,

.....,
Justice.

FORM 41.**ORDER CONSOLIDATING ACTIONS.**

At a Special Term of the Supreme Court,
 Part thereof, held in and for
 the County of, at the County
 Court House, City of, on
 the day of, 19..

Present — Hon., Justice.

.....,
Plaintiff,
against
.....,
Defendants.

An order having been heretofore made herein by
 Mr. Justice, directing the following
 parties:, and
 to show cause why an order should
 not be made consolidating the action of
 v., and the action of
 v., now pending
 in the Court with this action; and said
 motion having come duly on to be heard on the
 day of, 19..

NOW, on reading and filing the said order to show
 cause, and the affidavit of, verified
 the day of, 19.., upon which the
 same is based, and the affidavit of,
 verified the day of, 19.., showing

due service of the same; and it appearing that each of the aforesaid actions is brought to foreclose a mechanic's lien upon the same premises and that this action was commenced in this court at a date prior to the commencement of the other said actions, and after hearing, etc.

NOW, upon motion of, Attorney for the defendant,, it is

ORDERED, That the action brought in this court (or other court as the case may be) by, as plaintiff, against and, as defendants, be and it hereby is consolidated with this action, (make same statement for each action consolidated), and it is further

ORDERED, That the several statements of the causes of action, defenses, counterclaims and replies already made in the pleadings in said actions stand as statements thereof, in the said consolidated action; and that all further proceedings in this action shall be under the title of and (naming all plaintiffs) against (naming all defendants), and that such defendants as have appeared and have not answered in the said several actions, shall serve their respective answers in this consolidated action upon the respective attorneys for the various plaintiffs in this consolidated action within days after service of a copy of this order on their respective attorneys, and that when issues have been joined, as herein provided, this action shall proceed to trial upon a notice of trial upon the part of either of the plaintiffs herein, and it is further

ORDERED, That this order be and the same hereby

is granted without prejudice to the right to costs and allowances on the part of either or all of the respective plaintiffs in this consolidated action.

.....,
Justice.

FORM 42.

AFFIDAVIT FOR ORDER OF REFERENCE.³⁶

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that he is the plaintiff herein. That this action is brought to foreclose a mechanic's lien filed by the plaintiff against the interest of, as owner of certain real property described in the complaint herein. That the plaintiff's lien is for the sum of Dollars, and is founded upon a building contract made by the defendant with the plaintiff and upon additional work

³⁶ See § 238 of text.

done and materials furnished by the plaintiff to said

That issue was joined herein by the service of a
 reply to defendant's answer on the day of
, 19..

That there is annexed to the complaint a schedule
 of additional work containing items and
 amounting in the whole to the sum of \$.....

That the answer herein denies performance of the
 contract work, and denies the value of the additional
 work, and that the schedule of additional work cor-
 rectly sets forth the work, labor and services and the
 materials furnished and changes and alterations
 made by deponent, denies the amount claimed by de-
 ponent as due and owing, and alleges a counterclaim
 amounting to about \$..... or claimed to have
 been sustained by defendant as damages in the loss of
 rents by reason of the alleged failure of deponent to
 complete the contract within a specified time. That
 there is a further counterclaim for \$.....
 claimed as liquidated damages for the alleged failure
 of deponent to complete said contract before a speci-
 fied time, etc.

That the trial of this action will, as deponent is in-
 formed and believes, require the examination of a
 long account on the side of the plaintiff and possibly
 on the side of the defendant.

.....

Sworn to before me this }
 day of, 19.. }

FORM 43.**ORDER OF REFERENCE.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

Present — Hon., Justice.

<p>....., Plaintiff, against , Defendant.</p>	}
--	---

A motion made by the plaintiff herein having heretofore come on to be heard before me for an order referring this action to a Referee to hear and determine the same,

NOW, after reading and filing the notice of motion for such order dated the day of, 19.., and the affidavit of accompanying said notice of motion verified the day of, 19.., and the affidavit of verified the day of, 19.., showing due proof of the service of said notice of motion and affidavit,

And, after hearing, Esq., of counsel, for the plaintiff in support of said motion,, Esq., of counsel, for the defendant in opposition,

Now, on the motion of, Attorney for the plaintiff, it is

ORDERED, That said motion be and the same hereby is granted, and it is further

ORDERED, That this action be and it hereby is referred to, Esq., Counselor-at-law, of, City of, as sole referee to hear and determine the same.

.....,

Justice.

FORM 44.

DECISION AND FINDINGS. LIEN ON REAL PROPERTY.³⁷

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

The issues in this action having been tried before the undersigned at a Special Term of this Court, Part, held at the County Court House, in the County of, at, on the day of, 19..,, Attorney, and, of Counsel, appearing for the

³⁷ See §§ 239-240 of text.

plaintiff, and , Attorney, and
....., of Counsel, appearing for the defendant,
.....; the parties hereto having presented
their respective proofs and the same having been duly
considered, I find and decide as follows, stating con-
cisely the grounds upon which the issues in this action
are decided.

The following facts were established before me by
a preponderance of evidence.

(1). That the plaintiff performed labor and fur-
nished material upon the premises owned by the de-
fendant and described in the com-
plaint herein, between the day of
19.., and the day of 19.., under
a contract with said owner.

(2). That said labor was performed and said ma-
terials were furnished with the knowledge and con-
sent of the defendant

(3). That the agreed price of said labor and ma-
terials is \$....., no part of which has been paid
to the plaintiff, and at the time of the filing of the
plaintiff's notice of lien hereinafter mentioned there
was due from said to the plaintiff
the sum of \$..... with interest from the
day of, 19..

(4). That on the day of, 19..,
and within 90 days after the completion of said work
and the furnishing of said materials, the plaintiff
herein filed a notice of lien against said property in
the office of the Clerk of the County of,
and on the day of, 19.., the plain-
tiff filed in the office of the Clerk of the County of
..... a notice of pendency of this action.

Upon the grounds above stated I find and decide as
follows:

(1). That the plaintiff is entitled to a judgment establishing his lien as prayed for in the complaint amounting to the sum of \$....., with interest from the day of, 19.., which sum amounting in all to \$....., together with costs and disbursements, is a lien on all the right, title and interest which the defendant had on the day of, 19.., the date of the filing of said lien, in and to the property described in the complaint.

(2). That the plaintiff is entitled to judgment against the defendant barring and foreclosing him and all persons claiming under him of all interest and equity of redemption in and to said premises, for a sale of all right, title and interest which said defendant had in and to said premises at the time of the filing of said lien and for the payment to the plaintiff from the proceeds of said sale, of said sum of \$....., together with costs and disbursements to be taxed, which said costs and disbursements are hereby awarded to the plaintiff from the defendant

Judgment is directed in favor of the plaintiff and against the defendant in conformity with this decision.

Dated,, 19..

.....,

Justice, Supreme Court.

FORM 45.**JUDGMENT. LIEN ON REAL PROPERTY.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

Present — Hon., Justice.

<p>....., Plaintiff, against, Defendant.</p>
--

This action being for the foreclosure of a mechanic's lien upon real property, and the issues therein having come regularly on for trial before Hon., one of the Justices of this Court, at a Special Term thereof, held at Part, at the County Court House, in the City of, on the day of, 19.., and the plaintiff having appeared on said trial by, Attorney, and the defendant having appeared by, his attorney, and the defendant,, by, his attorney, and this cause having been duly tried and the court having heard the allegations and proofs of the parties, and a decision in writing stating the grounds upon which the issues herein were decided by the court, having been made and filed, whereby judgment is

ordered and directed in favor of the plaintiff against the defendant, barring and foreclosing him and all persons claiming under him, of all interest and equity of redemption in and to the premises described in the complaint herein, and for a sale of all the right, title and interest which he had in and to said premises, at the time of filing the lien described in the complaint, and for the payment to the plaintiff from the proceeds of such sale of the sum of \$....., with interest thereon from the day of, 19.., the said sum, with interest amounting on the day of, 19.., to \$....., being the amount of the plaintiff's claim to the date of said decision, together with plaintiff's costs and disbursements of this action, which have been taxed at the sum of \$.....

Now, on motion of, attorney for the plaintiff, it is

ORDERED, ADJUDGED and DECREED, That all right, title and interest which the defendant had in and to the premises described in the complaint herein, and hereafter particularly described, on the day of, 19.., at the time of filing plaintiff's lien described in the complaint be sold in one parcel at public auction in the city of, by or under the direction of, Esq., Counselor-at-law, who is hereby appointed Referee for that purpose, and that the said Referee give public notice of the time and place of such sale, according to law; that either of the parties to this action may purchase at said sale; that said Referee deliver to the purchaser or purchasers a deed or deeds of the premises sold, on the purchasers complying with terms on which the same were sold; that out of the proceeds of such sale, after deducting his fees and the expenses thereof, the said

Referee pay to the plaintiff or his attorneys the sum of \$....., the costs taxed as aforesaid, with interest thereon from this date, and that he further pay to the plaintiff or his attorney the sum of \$....., the amount of claim and interest found due as aforesaid, with interest thereon from the day of, 19.., the date of said decision, or so much thereof as the purchase money of said premises will pay of the same, and take receipts therefor and file them with his report; that said Referee pay the surplus arising on said sale, if any, to the Chamberlain of the City of, (County Treasurer) to the credit of this action within 5 days after he receives the same, to be drawn only on order of this court, signed by the Clerk and a Judge thereof; that he make a report of such sale and file it with the Clerk of this Court with all convenient speed; and that the purchaser or purchasers be let into possession on production of the Referee's Deed; and it is further

ORDERED, ADJUDGED and DECREED, That the defendant, and all persons claiming under him, subsequent to the filing of the notice of pendency of this action on the day of, 19.., be forever barred and foreclosed of all right, title, interest, claim and equity of redemption of, in and to the premises sold as aforesaid, and every part thereof with the appurtenances.

The following is a description of the premises:

(Description.)

Enter:

.....,

Justice, Supreme Court.

FORM 46.

**DECISION AND FINDINGS. PUBLIC IMPROVEMENT LIEN
BY LIENOR CLAIMING THROUGH A SUB-CON-
TRACTOR, WHERE LIEN HAS BEEN DIS-
CHARGED BY AN UNDERTAKING.**

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	}

This action having been brought to foreclose a mechanic's lien filed against the moneys due or to grow due under a contract between the defendant (contractor) and the City of, and the moneys due or to grow due under the contract between the defendant, (contractor) and, (sub-contractor) and the summons and a copy of the complaint having been duly served upon all of the defendants above named and the defendants, and having answered herein, and the issues having come on for trial before me at a Special Term of the Supreme Court, Part, held in and for the County of, at the County Court House therein on the and days of, 19.., and the plaintiff having appeared herein upon said trial by, its attorney, and the defendant having ap-

peared upon said trial by, and the defendant City of having appeared by, its attorney,, as counsel, etc., and after hearing the proofs and allegations of the respective parties, and due deliberation having been had, I do hereby find and decide as follows:

FINDINGS OF FACT.

(1). That on the day of, 19.., the defendant entered into a contract with the defendant, City of, for (state object of contract) according to certain plans and specifications in said contract set forth for the sum of \$....., which said sum has been or was thereafter duly appropriated by the said City of for the purpose of paying for the construction of the said public improvement.

(2). That thereafter the defendant entered upon the performance of the said contract and during the same the said sublet and sub-contracted part of the said work to be done and materials to be furnished, to the defendant (sub-contractor). That said (sub-contractor) entered upon the performance of its said contract and completed the same, at the time of the filing of the mechanic's lien by the plaintiff, and there was then due or thereafter became due from the City of to the said (contractor) the sum of \$..... That there was also due from the defendant (contractor) to the said (sub-contractor) the sum of \$.....

(3). That on the day of, 19.., the plaintiff entered into a contract with the defend-

ant (sub-contractor) whereby the plaintiff agreed to furnish labor and materials necessary to install, etc., (describe contract) and whereby the defendant (sub-contractor) agreed to pay to the plaintiff for the said work so done and the materials so furnished the sum of \$.....

(4). That thereafter the plaintiff entered upon the performance of said contract, etc. (state amount due, and interest, date, etc.).

(5). Set forth filing of liens, etc.

(6). That on the day of, 19.., the defendant (contractor) filed with the comptroller of the City of, a bond unto the City of, with the surety of the Surety Co., duly executed by the said defendant, and by the Surety Co., in the sum of \$..... conditioned for the payment of any judgment which may be recovered in an action to foreclose the lien of the plaintiffs; that said bond was duly approved before filing by the Justice of the Supreme Court, County, and an order was made discharging the plaintiff's lien and directing its cancellation which was duly entered and filed in the office of the Clerk of the County of; that thereupon said bond was duly filed with the Comptroller of said City of, and the said notice of lien filed by plaintiff against said public improvement was cancelled and discharged of record.

(7). That at the time of the filing of the said notice of lien and all notices of lien hereinafter mentioned the construction of the said public improvement had not been accepted by the said City of, and

that 30 days had not elapsed since the completion and acceptance thereof.

(Similar findings as to other lienors.)

(8). That the said materials furnished and the labor performed as aforesaid by the plaintiff and the defendant were furnished and performed for the defendant (sub-contractor) and (contractor) in and toward the performance and completion of the said contract hereinbefore mentioned between the said (contractor) and the City of and were actually done and used in the performance and completion of the same.

CONCLUSIONS OF LAW.

(1). That there is now due and owing to the plaintiff from the defendant (sub-contractor) for materials and labor furnished and performed by the plaintiff as aforesaid the sum of \$....., with interest from the day of, 19..

(2). That the plaintiff by the filing of the lien as aforesaid acquired a good, valid and subsisting lien for the sum of \$..... and interest upon the said sum due upon the contract between the defendant (contractor) and the City of, and due on the contract between the defendant (sub-contractor) and the defendant, (contractor) to the extent of \$....., with interest from the day of, 19.., with the costs and disbursements of this action.

(3). That the said lien of the plaintiff having been discharged by the giving of a bond in the sum of

\$..... by the defendant unto the City of with the Surety Co. as surety, that the plaintiff have judgment against the City of for one in form only for the amount of the lien and interest as aforesaid.

(4). That there is now due and owing to the plaintiff from the defendant (sub-contractor); (contractor) and the Surety Co., the sum of \$....., with interest from the day of, 19..

(5.) (Same as to other liens sustained).

(6). That the defendants, and, etc., have no claim or lien upon the fund in this action.

(7). That out of the said sum of \$..... so found due on the contract between (sub-contractor) and (contractor) on account of the contract between the defendant and the said City of, there shall be paid to the plaintiff, the sum of \$....., the amount due plaintiff under the said lien, together with interest thereon from the day of, 19., and the costs and disbursements of the action and that the balance of said fund be paid to the defendant,, on account of its lien for \$....., etc.

And I order and direct judgment accordingly.

.....,

Justice, Supreme Court.

FORM 47.**JUDGMENT. PUBLIC IMPROVEMENT LIEN.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

.....,	}
Plaintiff,	
against	
.....,	
Defendants.	}

The issues in this action having come on for trial before the Special Term, Part, of the Supreme Court, held in and for the County of, at the County Court House therein, on the and days of, 19.., and the plaintiff having appeared by, Esq., its attorney, and the defendant City of having appeared upon said trial by, Esq., and, of Counsel, etc., and the allegations and evidence of the parties to this action who appeared upon said trial having been heard, and due deliberation having been had, and a decision having been made and filed herein by the Justice before whom this action was tried, stating separately the facts found and the conclusions of law upon which the issues have been decided,

Now, on motion of, Esq., attorney for the plaintiff, it is

ORDERED, ADJUDGED and DECREED, That

the plaintiff, and the defendant, by the filing of their respective notices of mechanic's liens referred to in the decision made and filed in this action, acquired good, valid and subsisting liens upon the moneys due under the contract between the defendant (contractor) and the City of, and under the contract between the defendant (sub-contractor) and the defendant, (contractor) to the extent of the amount of their respective liens with interest thereon and that at the time of the filing of the said liens there was and remained due under the said contract and applicable to the payment of the said liens the sum of \$..... It is further

ORDERED, ADJUDGED and DECREED, That the plaintiff, recover of the defendant,, (sub-contractor) (contractor) and Surety Company, the sum of \$....., with interest thereon from the day of, 19.., amounting to \$..... and amounting in the aggregate to \$....., together with \$..... costs to be taxed, amounting in all to the sum of \$....., and that the defendant (same as to the other defendants) and that the plaintiff and the defendant have executions therefor, and that the plaintiff or any other party to this action may apply at the foot of this decree for such other and further relief as may be just, and the Clerk of the County of is hereby directed to insert in the blank spaces left in this judgment for that purpose the amount of the plaintiff's costs to be taxed.

Enter:

.....,

Justice, Supreme Court.

FORM 48.**REFEREE'S REPORT.**

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

To the Supreme Court of the State of New York:

I,, the Referee appointed herein by order of this court duly entered on the day of, 19.., to hear and determine all the issues herein, do respectfully report and decide as follows:

Before entering upon the performance of my duties as Referee herein, I took the oath prescribed by law, which is hereto annexed; I was attended by Esq., attorney for the plaintiff; Esq., of Counsel;, Esq., Attorney for the defendant, and Esq., attorney for defendant

I have heard all the proofs and allegations which the plaintiff and defendants have offered and from the pleadings and proceedings herein, and such proof I do find, report and decide, and I do make this my decision, stating concisely the grounds upon which the issues have been decided, as follows:

1. (Continue, stating findings of fact and law, as in Form 46).

FORM 49.**JUDGMENT ON REFEREE'S REPORT.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

<p>....., Plaintiff, against, Defendant.</p>	}
--	---

On reading and filing the affidavit of,
verified the day of, 19.., and upon
the pleadings and all other papers and proceedings
had herein, whereby it satisfactorily appears to the
court, among other things, in substance, that this
action was brought to foreclose a certain mechanic's
lien for the sum of \$...... and interest, filed in
the office of the Clerk of the County of on
the day of, 19.., against the inter-
est of, as owner of the premises
known as No., City of,
and more particularly mentioned and described here-
inafter; that a notice of pendency of this action was
duly filed on the day of, 19.., in
the office of the Clerk of the County of;
that all of the defendants were duly served with the
summons and complaint herein or have voluntarily

appeared by their attorneys; that the defendant appeared by, Esq., his attorney, etc., that the defendant did not answer or demur to the complaint herein and that the time therefor has fully expired.

And this action having been referred to
, Esq., to hear and determine all the issues herein, by order duly made and entered herein bearing date the day of, 19.., and the said Referee having been attended by, Esq., Attorney for the plaintiff, etc., and said Referee having heard all the proofs and allegations offered by the plaintiff and defendants and having duly made his report and decision, dated the day of, 19.., which has been duly filed in the office of the Clerk of the County of, on the day of, 19.., whereby he orders and directs judgment in favor of the plaintiff and against the defendants and, barring and foreclosing them and each of them of all interest and equity of redemption in and to the premises described in the complaint herein, and for a sale of all the right, title and interest which they and each of them had in and to said premises at the time of filing the said notice of lien, and for the payment to the plaintiff from the proceeds of such sale of the sum of \$....., being the amount of plaintiff's claim and interest to the date of said report, and the plaintiff's costs and disbursements to be taxed, and in case said proceeds be insufficient to pay the sums aforesaid, for judgment against the defendant
 for any deficiency so remaining,

Now, therefore, on motion of, Esq., attorney for the plaintiff, it is

ORDERED, That said report be and the same is in all respects confirmed; and it is further

ORDERED, ADJUDGED and DECREED, That all the right, title and interest which the defendants, and , and each of them had in and to the premises described in the complaint herein, and hereafter more particularly described, on the day of, 19.., at the time of the filing of the said lien described in the complaint herein, be sold in one parcel at public auction, in the City of, by or under the direction of, Esq., of the City of, Counselor-at-law, who is hereby appointed Referee for that purpose, and that said Referee give public notice of the time and place of such sale according to law; that either of the parties to this action may purchase at said sale; that said Referee deliver a deed or deeds of the premises sold on the purchaser's complying with the terms on which the same were sold; that out of the proceeds of such sale after deducting his fees, and the expenses thereof, the said Referee pay to the plaintiff or his attorney the sum of \$....., the aggregate amount of costs taxed as aforesaid with interest thereon from this date, and that he further pay to the plaintiff or his attorney \$....., the amount of claim and interest reported due as aforesaid, and with interest thereon from the day of, 19.., the date of said report, or so much thereof as the purchase money of said premises will pay of the same and take receipts therefor and file the same with his report; that said referee pay the surplus arising on said sale if any to the Chamberlain of the City of, (County Treasurer) to the credit of this action, to be drawn only on the order of this court signed by the Clerk; and a Judge thereof, within five days after he receives the same; that he make a report of such sale and file it with all convenient speed with

the Clerk of this court; that if there be any deficiency remaining on such sale, said Referee specify the amount thereof in his report of sale, and that the plaintiff recover of the defendant, the amount of deficiency so remaining and have execution therefor, and that the purchaser be let into possession on the production of the Referee's Deed. And it is further

ORDERED, ADJUDGED and DECREED, that the said defendants and each of them, and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action (which as appears from the report of said Referee was filed in the Office of the Clerk of the County of, on the day of, 19..) be forever barred and foreclosed of all right, title and interest, tractor, but itself as a party to the contract, and it is claim, lien and equity of redemption, of, in and to the premises sold as aforesaid, and every part thereof with appurtenances.

The following is a description of the premises:

(Description.)

Enter:

.,
Justice, Supreme Court.

FORM 50.**NOTICE OF CLAIM TO SURPLUS MONEYS, BY LIENOR,
UPON FORECLOSURE OF PRIOR MORTGAGE.**

Supreme Court — County.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

Take notice that is entitled to the surplus moneys or part thereof arising on the sale made in this action on the day of, 19..; the claim of said is for Dollars and interest from the day of, 19.., by virtue of a mechanic's lien upon the mortgaged premises, notice of which was duly filed in the office of the Clerk of the County of on the day of, 19.., by said against the interest of as owner in said real property, before the commencement of this action.

Dated,, 19..

.....,
Attorney for Claimant.

To: Clerk of the County of

FORM 51.**NOTICE OF MOTION FOR ORDER OF REFERENCE.**

Supreme Court — County of

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

PLEASE TAKE NOTICE that upon the annexed affidavit of, verified the day of, 19.., and upon the certificate of, Esq., Clerk of the County of, dated the day of, 19.., and upon the notice of claim of, dated the day of, 19.., the undersigned will move this court, at a Special Term, Part thereof, to be held on the day of, 19.., at o'clock, .. M., or as soon thereafter as counsel can be heard for an order referring it to a referee to ascertain and report the amount due to said or to any other person which is a lien upon such surplus moneys and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of such report of such referee such other further order may be made for the distribution of such

surplus moneys as may be just, and for such other and further relief as to the court may seem just and proper.

Dated, 19..

.....,
Atty. for Claimant.

To:

.....,
Claimants or Attorneys.

FORM 52.

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER OF REFERENCE TO COMPUTE CLAIMS TO SURPLUS MONEYS.

Supreme Court — County of

<p>....., Plaintiff, against, Defendant.</p>	}
--	---

State of New York, }
County of } ss.:

....., being duly sworn, deposes and says that he is the attorney for, one of the defendants in this action, which was brought to foreclose a mortgage upon real property within this county.

That judgment has been entered in said action and a sale has been made of the mortgaged premises under the direction of this court; that the claim of the plaintiff has been paid, and that as appears by the report of, Esq., Referee, filed in the office of the Clerk of the County of, on the day of, 19.., there remains a surplus of dollars over and above the amount due on said mortgage and costs of this action, which surplus has been brought into court subject to the order thereof.

That the defendant has a claim on said surplus moneys amounting to dollars, which claim is stated in the annexed copy of notice, which notice was on the day of, 19.., filed on behalf of said defendant with the Clerk of the County of

That the following persons and no others have filed notices of claim against said surplus moneys, to wit:

..... for dollars,
 for dollars.

That the following unsatisfied liens existed against the said property and no others:

Sworn to before me this {
 day of, 19.. }

.....

FORM 53.

CERTIFICATE OF COUNTY CLERK.

Supreme Court — County of

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

County of ss.:

I,, Clerk of the County of, do hereby certify that I have examined the files in my office and find that the following named parties have appeared in this action:

.....; and
That on the day of, 19.., the Referee filed his report of sale showing a surplus of Dollars.

That on the day of, 19.., the defendant filed a notice of claim to said surplus.

That on the day of, 19.., the defendant filed a notice of claim to said surplus.

That no other notices of claim have been filed to said surplus.

WITNESS my hand and seal this day of, 19..

.....,
County Clerk of County.

FORM 54.**ORDER OF REFERENCE TO DETERMINE CLAIMS TO
SURPLUS MONEYS.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

Present — Hon., Justice.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

Upon reading and filing the notice of motion herein dated the day of, 19.., for an order referring it to a Referee to ascertain and report the amount due to, or to any other person, which is a lien upon the surplus moneys in this action; and to ascertain the priorities of the several liens thereon to the end that on the coming in and confirmation of the report of such Referee such further order may be made for the distribution of said surplus as might be just; and the affidavit of, verified the day of, 19..; the notice of claim of, to said surplus moneys, dated the day of, 19..; the certificate of, Clerk of the County of, dated the day of, 19..; and proof of

due service of this application upon the defendants
 and the owners of the
 equity of redemption; and upon all parties who have
 appeared or served notice of claim to such moneys; and
 said motion coming regularly on to be heard, after
 hearing, attorney for,
 in favor of said motion; and, attorney
 for, appearing but not opposing,

NOW, on motion of, Attorney for
, it is

ORDERED, That it be referred to,
 Esq., of, to ascertain and report to
 this court the amount due the said
 and to any other person which was a lien upon the
 mortgaged premises at the time of the sale thereof;
 and to ascertain the priorities of the several liens
 thereon, and to report with all convenient speed.

Enter:

.....,
 Justice Supreme Court.

FORM 55.**NOTICE OF MOTION TO CONFIRM REFEREE'S REPORT.**

Supreme Court — County of

<p>.....,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">against</p> <p>.....,</p> <p style="text-align: center;">Defendant.</p>	}
--	---

PLEASE TAKE NOTICE that the report of
, Esq., Referee heretofore duly appointed by order bearing date the day of, 19.., to ascertain and report the amount due to, or any other person, which was a lien upon the mortgaged premises at the time of the sale thereof, and the priorities of the several liens thereon, was duly filed in the office of the Clerk of the County of, on the day of, 19.., and that upon said report, and upon all the proceedings heretofore had herein the undersigned will move this court at a Special Term, Part thereof to be held in the County Court House on the day of, 19.., at o'clock, A. M., or as soon thereafter as counsel can be heard, for an order confirming the said referee's report, and for the distribution of the surplus moneys herein, as recommended in said report, and

for such other and further relief as to the court may seem just and proper, together with costs of this motion.

Dated,, 19..

.....,
Attorney for

To:

.....,
.....

FORM 56.

**ORDER CONFIRMING REFEREE'S REPORT AND DIRECT-
ING DISTRIBUTION OF SURPLUS MONEYS.**

At a Special Term of the Supreme Court,
held in and for the County of,
at the County Court House, in the City
of, on the day of
....., 19..

Present — Hon., Justice.

.....,	}
Plaintiff,	
against	
.....,	
Defendant.	

An order having been heretofore granted herein dated the day of, 19.., referring it

to, Esq., to ascertain and report to this court the amount due to and to any other person, which was a lien upon the mortgaged premises herein at the time of the sale thereof, and to ascertain the priorities of the several liens thereon and to report with all convenient speed, and the said referee having thereafter duly made and filed his report confirming said referee's report and for the distribution of the surplus moneys herein as recommended in said report, and for such other and further relief as to the court may seem just and proper,

Upon reading and filing the said notice of motion dated the day of, 19..; the report of sale filed herein in the office of the Clerk of the County of, on the day of, 19..; the notice of claim of and, filed respectively in the office of the Clerk of the County of, on the day of, 19.., and the day of, 19..; the certificate of, Esq., Clerk of said County of, dated the day of, 19..; the affidavit of, verified the day of, 19..; the notice of motion dated the day, 19..; the order of reference duly made herein on the day of, 19..; the report of, Esq., referee filed in the office of the Clerk of the County of, on the day of, 19..; and said motion coming on regularly to be heard, after hearing, Esq., Attorney for in support of said motion, and, Esq., Attorney for, in opposition thereto, and due deliberation being had,

NOW, on motion of, Attorney for, it is

ORDERED, That the report of, Esq., referee herein, filed in the office of the Clerk of the County of, on the day of, 19.., be and the same hereby is in all respects confirmed, and it is further

ORDERED, That the Chamberlain of the City of, be and is hereby directed upon the service on him of a duly certified and countersigned copy of this order to pay out of the moneys, remaining in his hands to the credit of this action, including accrued interest, to the persons below named, the sums set opposite their respective names, as follows:

First.—To, Esq., Attorney for, the sum of Ten (\$10.00.) Dollars, costs of this action. The sum of Dollars, the fees paid by them to the Referee herein, and the sum of Dollars for stenographer's minutes herein;

Second.—After deducting the aforesaid sums, to the defendant, or, his attorney, the sum of Dollars, etc.

Enter:

.....,

Justice, Supreme Court.

LIEN LAW

Laws of 1909, Chapter 38.

In effect Feb. 17, 1909, as amended to date.

CHAPTER 33 OF THE CONSOLIDATED LAWS

ARTICLE 1.

SHORT TITLE; DEFINITIONS.

SECTION 1. Short title.

2. Definitions.

§ 1. Short title.

This chapter shall be known as the "Lien Law."

§ 2. Definitions. Lienor.

The term lienor, when used in this chapter, means any person having a lien upon property by virtue of its provisions, and includes his successor in interest.

Real property.

The term real property, when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right of franchise granted by a municipal corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise.

Owner.

The term owner, when used in this chapter, includes the owner in fee of real property or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such

real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a municipal corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise. The purchaser of real property at a statutory or judicial sale shall be deemed the owner thereof, from the time of such sale. If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent after such sale shall be a lien on any deposit made by him and not on the real property sold.

Improvement.

The term improvement, when used in this chapter, includes the erection, alteration or repair of any structure, upon, connected with, or beneath the surface of, any real property and any work done upon such property, or materials furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light.

Public improvement.

The term public improvement, when used in this chapter, means an improvement upon any real property belonging to the state or a municipal corporation.

Contractor.

The term contractor, when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof.

Sub-contractor.

The term sub-contractor, when used in this chapter, means a person who enters into a contract for the improvement of such real property with a contractor, or with a person who has contracted with or through such contractor, for the performance of his contract or any part thereof.

Laborer.

The term laborer, when used in this chapter, means any person who performs labor or services upon such improvement.

Material man.

The term material man, when used in this chapter, means any person other than a contractor who furnishes material for such improvement.”
(As amended by the Laws of 1914, Chapter 506.)

ARTICLE 2.

MECHANICS' LIENS.

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§ 3. Mechanic's lien on real property.

A contractor, sub-contractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article.

§ 4. Extent of lien.

Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty

days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to a contractor or sub-contractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

§ 5. Liens under contracts for public improvements.

A person performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or a municipal corporation, shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of the state or of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract, upon filing a notice of lien as prescribed in this article.

§ 6. Liens for labor on railroads.

Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of mechanic's lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the code of civil procedure for the service of summons in actions in justices' courts against domestic railroad corporations.

§ 7. Liability of owner for advance payments, collusive mortgages and incumbrances.

Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the

terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a sub-contractor, laborer or material man under such contract, created before such payment actually becomes due. A mortgage, lien or incumbrance made by an owner of real property, for the purpose of avoiding the provisions of this article, with the knowledge or privity of the person in whose favor the mortgage, lien or incumbrance is created, shall be void and of no effect as against a claim on account of the improvement of such real property, existing at the time of the creation of such mortgage, lien or incumbrance.

§ 8. Terms of contract may be demanded.

A statement of the terms of a contract pursuant to which an improvement of real property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly authorized agent, to a sub-contractor, laborer or material man performing labor for or furnishing materials to a contractor, his agent or sub-contractor, under such contract. If, upon such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a sub-contractor, laborer or material man has not been paid the amount of his claim against a contractor or sub-contractor, under such contract, and a judgment has been obtained and execution issued against such contractor or sub-contractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such sub-contractor, laborer or material man, filed as prescribed in this article, against the real property improved, for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner.

§ 9. Contents of notice of lien.

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or sub-contractor, the person with whom the contract was made.

4. The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a mis-description of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

§ 10. Filing of notice.

The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within 90 days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the 'lien docket,' which shall be suitably ruled in columns headed 'owners,' 'lienors,' 'property,' 'amount,' 'time of filing,' 'proceedings had,' in each of which he shall enter the particulars of the notice properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

§ 11. Service of copy of notice.

At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, if a natural person, by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said ser-

vice shall be made by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or by registered letter addressed to its last known place of business. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien. (Amended by Laws 1913, ch. 88. In effect March 20, 1913.)

§ 12. Notice of lien on account of public improvements.

At any time before the construction of a public improvement is completed and accepted by the state or by the municipal corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his sub-contractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction and with the comptroller of the state or with the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made. The notice shall state the name and residence of the lienor, the name of the contractor or sub-contractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished and give a general description of the contract pursuant to which such public improvement was constructed. If the lienor is a partnership or a corporation, the notice shall state the business address of such partnership or corporation, the names of the partners, and if a foreign corporation, its principal place of business within the state. If the name of the contractor or sub-contractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the contractor or sub-contractor shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The comptroller of the state or the financial officer of the municipal corporation or other officer or person with whom the notice is filed shall enter the same in a book provided for that purpose, to be called the 'lien book.' Such entry shall include the name and residence of the lienor, the name of the contractor or sub-

contractor, the amount of the lien and date of filing, and a brief designation of the contract under which the lien arose.

§ 13. Priority of liens.

A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien; over advances made upon any mortgage or other incumbrance thereon after such filing; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of such notice. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used. Persons standing in equal degrees as co-laborers or material men, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article, without reference to the time when such laborers shall have filed their notices of liens.

§ 14. Assignment of lien.

A lien, filed as prescribed in this article, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Such assignment shall contain the names and places of residence of the assignor and assignee, the amount of the lien and the date of filing the notice of lien, and be filed in the office where the notice of the lien assigned is filed. The facts relating to such an assignment and the names of the assignee shall be entered by the proper officer in the book where the notice of lien is entered and opposite the entry thereof. Unless such assignment is filed, the assignee need not be made a defendant in an action to foreclose a mortgage, lien or other incumbrance. A payment made by the owner of the real property subject to the lien assigned, or by his agent or contractor, or by the contractor of a municipal corporation, to the original lienor, on account of such lien, without notice of such assignment and before the same is filed, shall be valid and of full force and effect. Except as prescribed herein, the validity of an assignment of a lien shall not be affected by a failure to file the same.

§ 15. Assignments of contracts and orders to be filed.

No assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property or of the money or any part thereof due or to become due therefor, nor an order drawn by a contractor or sub-contractor upon the owner of such real property for the payment of such money shall be valid, until the contract or a statement containing the substance thereof, and such assignment or a copy of each or a copy of such order, be filed in the office of the county clerk of the county wherein the real property improved or to be improved is situated, and in case of a contract with a municipal corporation, also with the comptroller or chief fiscal officer thereof, and such contract, assignment or order shall have effect and be enforceable from the time of such filing. Such clerk shall enter the facts relating to such assignment or order in the 'lien docket' or in another book provided by him for such purpose.

§ 16. Assignment of contracts and orders for public improvement to be filed.

No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the municipal corporation, or the head of the department or bureau having charge of the construction of such public improvement, or the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid until such assignment or order, or a copy thereof, be filed with the head of the department or bureau having charge of such construction, and with the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be enforceable from the time of such filing. The financial officer of the municipal corporation, or other officer or person with whom the assignment or order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose.

§ 17. Duration of lien.

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action,

the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.

§ 18. Duration of lien under contract for a public improvement.

If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than three months from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the municipal corporation with whom the notice of such lien was filed, or unless an order be made by a court of record, continuing such lien, and a new docket be made stating such fact. And the supreme court of this state, or any justice thereof, or the county court of the county in which such lien was filed, or the county judge of such county, are hereby authorized to make an order continuing any such lien for a period not exceeding six months, upon the application of a lienor upon such affidavits or evidence as in the opinion of such court or judge shall be deemed sufficient. Nothing in this section contained, however, shall prevent any such court or judge from making a new order continuing such lien in each succeeding six months, if in the discretion of such court or judge the same shall be deemed just and equitable. This section is hereby declared to be a remedial statute and is to be construed liberally to secure the beneficial interests and purposes thereof.

§ 19. Discharge of lien generally.

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows: —

1. By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied and may be discharged.

2. By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien.

3. By order of the court vacating or canceling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

4. Either before or after the beginning of an action by the owner or contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. If the lienor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of said undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary.

§ 20. Discharge of lien by payment of money into court.

A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged, at any time before an action is commenced to foreclose such lien, by

depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such action is commenced the lien may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after at least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action. Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words 'discharged by payment.' A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of the code of civil procedure relative to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys may be made by any court of record having jurisdiction of the parties and of the subject matter of the proceeding for the foreclosure of the lien for the discharge of which such moneys were deposited. If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record.

§ 21. Discharge of lien for public improvement.

A lien against the amount due or to become due a contractor from the state or a municipal corporation for the construction of a public improvement may be discharged as follows:

1. By filing a certificate of the lienor or his successor in interest, duly acknowledged and proved, stating that the lien is discharged.

2. By lapse of time, when three months have elapsed since filing the notice of lien, and no action has been commenced to enforce the lien.

3. By satisfaction of a judgment rendered in an action to enforce the lien.

4. By the contractor depositing with the comptroller of the state or the financial officer of the municipal corporation, or the officer or person with whom the notice of lien is filed, such a sum of money as is directed by a justice of the supreme court, which shall not be less than the amount claimed by the lienor, with interest thereon for the term of one year from the time of making such deposit, and such additional amount as the justice deems sufficient to cover all costs and expenses. The amount so deposited shall remain with the comptroller or such financial officer or other officer or person until the lien is discharged as prescribed in sub-division one, two or three of this section.

5. Either before or after the beginning of an action by a contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the state or the municipal corporation with

which the notice of lien is filed, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking with notice that the sureties will justify before the court or a judge or justice thereof at the time and place therein mentioned must be served upon the lienor, not less than five days before such time. If the lienor cannot be found, such service may be made as prescribed in sub-division four of section 19 of this article. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien. The execution of such undertaking by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of such an undertaking by two sureties, and where a certificate of solvency has been issued by the superintendent of insurance under the provisions of section one hundred and eighty-one of the insurance law and has not been revoked, no justification or notice thereof shall be necessary. Any such undertaking may be executed in such undertaking as surety by the hand of its officers or attorney duly authorized thereto by resolution of its board of directors, a certified copy of which resolution under the seal of such company, shall be filed with each undertaking. Except as otherwise provided herein the provisions of article five of title six of chapter eighth of the code of civil procedure are applicable to an undertaking given for the discharge of a lien on account of public improvements.

(As amended by Laws of 1914, chapter 266).

§ 22. Building loan contract.

A contract for a building loan, either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and within ten days after its execution be filed in the office of the clerk of the county in which any part of the land is situated, and the same shall not be filed in the register's office of any county. If not so filed the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. A modification of such contract shall not affect or impair the right or interest of a person, who, previous to the filing of such modification, had furnished or contracted to furnish materials, or had performed or contracted to perform labor for the improvement of real property, but such right or interest shall be determined by the original contract. The county clerk is entitled to a fee of twenty cents for filing such a contract or modification. Such contracts and modifications thereof shall be indexed in a book provided for that purpose, in the alphabetical order of the names of the persons to whom such loans shall be made.

§ 23. Construction of article.

This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same.

§ 24. Enforcement of mechanic's lien.

The mechanics' liens specified in this article may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded, as prescribed in article three of this chapter.

§ 25. Priority of liens for public improvements.

Persons having liens under contracts for public improvements standing in equal degrees as co-laborers or material men shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other liens arising under the same contracts pursuant to this article, without reference to the time when such laborers shall have filed their notice of lien.

ARTICLE 3.

ENFORCEMENT OF LIENS ON REAL PROPERTY.

SECTION 40. Construction of article.

41. Enforcement of a mechanic's lien on real property.
42. Enforcement of a lien under contract for a public improvement.
43. Action in a court of record; consolidation of actions.
44. Parties to an action in a court of record.
45. Equities of lienors to be determined.
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47. How summons served, when personal service cannot be made.
48. Proceedings on return of summons; answer; judgment by default.
49. Issue, how tried; judgment.
50. Execution.
51. Appeals from judgments in courts not of record.
52. Transcripts of judgments in courts not of record.
53. Costs and disbursements.
54. Judgment in case of failure to establish lien.
55. Offer to pay money into court, or to deposit securities, in discharge of the lien.

SECTION 56. Preference over contractors.

57. Judgment may direct delivery of property in lieu of money.

58. Judgment for deficiency.

59. Vacating of a mechanic's lien, by order of court.

60. Judgment in action to foreclose lien on account of public improvement.

61. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation.

§ 40. Construction of article.

This article is to be construed in connection with article two of this chapter, and provides proceedings for the enforcement of liens for labor performed and materials furnished in the improvement of real property, created by virtue of such article.

§ 41. Enforcement of a mechanic's lien on real property.

A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.

§ 42. Enforcement of a lien under contract for a public improvement.

A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the municipal corporation for which such public improvement is constructed, to the extent prescribed in article two of this chapter, and against the contractor or sub-contractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.

§ 43. Action in a court of record; consolidation of actions.

The provisions of the code of civil procedure, relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided in this article. If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.

§ 44. Parties to an action in a court of record.

In an action in a court of record the following are necessary parties defendant:

1. All lienors having liens against the same property or any part thereof.

2. All other persons having subsequent liens or claims against the property, by judgment, mortgage or otherwise, and

3. All persons appearing by the records in the office of the county clerk or register to be overseers of such property or any part thereof. Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant. Two or more lienors having liens upon the same property or any part thereof, may join as plaintiffs.

4. The state, in the same manner as a private person, when the lien is one filed against funds of the state for which public improvement is constructed. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people.

§ 45. Equities of lienors to be determined.

The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action.

§ 46. Action in a court not of record.

If an action to enforce a mechanic's lien against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner, anywhere within the state, of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished. The form and contents of the summons shall be the same as provided by the code of civil procedure for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve or more than twenty days after the date of the summons, or, if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.

§ 47. How summons served, when personal service can not be made.

If personal service of the summons can not be made upon a defendant in an action in a court not of record, by reason of his absence from the state, or his concealment therein, such service may be made by leaving a copy thereof at his last place of residence and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated.

§ 48. Proceedings on return of summons; answer; judgment by default.

At the time and place specified in the summons for the return thereof, in a court not of record, issue must be joined, if both parties appear, by the defendant filing with the justice a verified answer, containing a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof; or any other matter constituting a defense to the lien or to the claim upon which it is founded. If the defendant fail to appear on the return day, on proof by affidavit of the service of the summons and complaint, judgment may be rendered for the amount claimed, with costs.

§ 49. Issue, how tried; judgment.

If issue is joined in such action in a court not of record, it must be tried in the same manner as other issues in such court, and judgment entered thereon, which shall be enforced, if for the plaintiff, in the manner provided in the following section. If for the defendant, in the same manner as in an action on contract in such court.

§ 50. Execution.

Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of the filing of the notice of lien.

§ 51. Appeals from judgments in courts not of record.

An appeal may be taken from such judgment rendered in a court not of record, according to the provisions of the code of civil procedure, regulating appeals from judgments in actions on contract in such courts.

§ 52. Transcripts of judgments in courts not of record.

When a judgment is rendered in a court not of record the justice or judge of the court in which it is tried, or other person authorized to furnish transcripts of judgments therein, shall furnish the successful party a transcript thereof, which he may file with the clerk of the county with whom the notice of lien is filed. The filing of such transcript has the same effect as the filing of a transcript of any other judgment rendered in such courts.

§ 53. Costs and disbursements.

If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are

to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

§ 54. Judgment in case of failure to establish lien.

If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.

§ 55. Offer to pay money into court, or to deposit securities, in discharge of the lien.

At any time after an action is brought under the provision of this article, the owner may make and file with the clerk with whom the notice of lien is filed, if in a court of record, and if in a court not of record, with the court, an offer to pay into court the sum of money stated therein, or to execute and deposit securities which he may describe, in discharge of the lien, and serve upon the plaintiff a copy of such offer. If a written acceptance of the offer is filed with such clerk, or court, within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order, that on depositing with such clerk, or court, the sum so offered, or the securities described, the lien shall be discharged, and that the money or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. If the offer is of money only, the court, on application and notice to the plaintiff, may make such order, without the acceptance of the offer by the plaintiff. If such action is brought in a court not of record, such order may be made by the county court of the county where such action is brought upon notice, and upon filing such order and depositing such sum of money or securities with the county clerk of such county, he shall forthwith discharge said notice of lien, by writing upon the margin of the record thereof, the words 'discharged by payment.' Money or securities deposited upon the acceptance of an offer pursuant to this section shall be held by the clerk or the court until the final determination of the action, including an appeal.

§ 56. Preference over contractors.

When a laborer or a material man shall perform labor or furnish materials for an improvement of real property for which he is entitled to a mechanic's lien, the amount due to him shall be paid out of the proceeds of the sale of such property under any judgment rendered pursuant to this article, in the order of priority of his lien, before any

part of such proceeds is paid to a contractor or sub-contractor. If several notices of lien are filed for the same claim, as where the contractor has filed a notice of lien, for the services of his workmen, and the workmen have also filed notices of lien, the judgment shall provide for but one payment of the claim which shall be paid to the parties entitled thereto in the order of priority. Payment voluntarily made upon any claim filed as a lien shall not impair or diminish the lien of any person except the person to whom the payment was made.

§ 57. Judgment may direct delivery of property in lieu of money.

If the owner has agreed to deliver bills, notes, securities or other obligations or any other species of property, in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, and the property affected by the lien cannot be sold, by virtue of such judgment, except in default of the owner to so deliver or deposit within the time directed by the court.

§ 58. Judgment for deficiency.

If upon the sale of the property under judgment in a court of record there is a deficiency of proceeds to pay the plaintiff's claim, judgment may be docketed for the deficiency against any person liable therefor, who shall be adjudged to pay the same in like manner and with like effect as in judgments for deficiency in foreclosure cases.

§ 59. Vacating of a mechanic's lien, by order of court.

A mechanic's lien on real property may be vacated and canceled by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed should not be vacated and canceled of record. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

§ 60. Judgment in action to foreclose lien on account of public improvement.

If, in an action to enforce a lien on account of a public improvement, the court finds that the lien is established, it shall render judgment directing the state or the municipal corporation to pay over to the

lienors entitled thereto for work done or material furnished for such public improvement, and in such order of priority as the court may determine, to the extent of the sums found due the lienors from the contractors, so much of the funds or money which may be due from the state or municipal corporation to the contractor, as will satisfy such liens, with interest and costs, not exceeding the amount due to the contractor.

§ 61. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation.

If the lien is for labor done or materials furnished for a railroad corporation, upon its land, or upon or for its track, rolling stock or the appurtenances of its railroad, the judgment shall not direct the sale of any of the real property described in the notice of the lien, but when in such case, a judgment is entered and docketed with the county clerk of the county where the notice of lien is filed, or a transcript thereof is filed and docketed in any other county, it shall be a lien upon the real property of the railroad corporation, against which it is obtained, to the same extent, and enforceable in like manner as other judgments of courts of record against such corporation.

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